Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

80-1396

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No. _____

---

**JEANNE BRANDON, et al.,**
*Petitioners,*

*-vs-*

**THE BOARD OF EDUCATION OF GUILDERLAND SCHOOL DISTRICT, et al.,**
*Respondents*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**ROBERT ANTHONY DESTRO**
for the Catholic League
for Religious and
Civil Rights
1100 W. Wells Street
Suite 501A
Milwaukee, WI 53233
(414) 289-0170

**ROBERT MICHAEL ANDERSEN**
2650 North Lakeview
Chicago, IL 60614
(414) 289-0170

**ROBERT P. ROCHE**
90 State Street
Room 1436
Albany, NY 12207
(518) 463-1193

*Attorneys For Petitioners*

## QUESTIONS PRESENTED

1. Whether, pursuant to the First Amendment's prohibition against establishment of religion, a school district must ban all student groups organized to engage in voluntary religious speech and prayer, even though the group proposed to meet on public high school property during a period of the day when school is not in session.

2. Whether, pursuant to the constitutional guarantees of freedom of speech, freedom of religion, freedom of association, and equal protection, a school district must allow student groups to voluntarily meet on public school property during off-school hours for the purpose of engaging in religious speech when access is given to other student groups.

## PARTIES

Petitioners are Jeanne Brandon, Erin Marie Conway, Jill George, Lisa A. Macaione, Lauren M. Rogers, and William Smith, on their own behalf, and on behalf of all those similarly situated. The respondents in this case are the Board of Education of the Guilderland Central School District, Guilderland, New York; Peter E. Knauss, Grace Serviss, William P. Chamberlin, Joseph L. Cohen, Beverly Le Blanc, Gordon S. Purrington, Patricia Renshaw, Alan L. Ross, and Richard M. Smith, all individual members of the Board of Education of Guilderland Central School District during the period relevant to the instant action; and Peter W. Alland and Charles Ciaccio, Superintendent of Schools in Guilderland, and principal of Guilderland High School, respectively. [Hereinafter collectively designated as the "Board of Education"]

TABLE OF CONTENTS

Opinion Below.....iii

Jurisdiction.....iii

Statutory Provisions Involved.....iv

Statement of the Case.....1

Reasons for Granting the Writ.....6

I. THE RULINGS BELOW CONFLICT WITH IMPORTANT ESTABLISHMENT CLAUSE PRINCIPLES ARTICULATED BY THIS COURT AND OTHER LOWER COURTS.....6

A. The Ruling Below Conflicts with Settled Establishment Clause and Principles Governing Neutrality School Prayer and Religious Release Time Programs Decided by this Court.....9

B. The Ruling Below Conflicts with the Decisions of Other Federal and State Courts and a Determination by This Court is Necessary to Insure Uniformity on this Important Constitutional Issue.....20

C. The Appellate Court Misapplied the Tripartite Test of Lemon v. Kurtzman by Banning Student-Initiated Religious Speech and Association.....26

1. The Relief Requested Was Secular in Nature and Religiously Neutral in Both Purpose and Effect.....27

2. The Relief Requested Would Not Have Resulted in Impermissable Administrative or Doctrinal Entanglement.....31

II. THE DECISION BELOW SUBORDINATES SETTLED PRINCIPLES OF FREEDOM OF SPEECH, FREEDOM OF ASSOCIATION, FREEOM OF RELIGION, AND EQUAL PROTECTION TO AN OVERBROAD AND CLEARLY ERRONEOUS CONSTRUCTION OF THE ESTABLISHMENT CLAUSE.....34

A. Free Speech and Equal Protection.....34

B. Associational Rights.....44

C. Free Exercise.....48

Conclusion.....52

Appendix (Opinion and Judgment of the Court of Appeals).....A-1

# TABLE OF AUTHORITIES

## Cases

*Abington School District v. Schempp*
*374 U.S. 203 (1963)*.....15

*Bantam Books, Inc. v. Sullivan,*
*372 U.S. 58 (1968)*.....35

*Board of Education v. Allen,*
*392 U.S. 236 (1968)*.....30

*Bonner-Lyons v. School Committee*
*of Boston, 480 F.2d 442*
*(1st Cir. 1973)*.....40

*Brooks v. Auburn University,*
*296 F.Supp. 188 (M.D. Ala. 1969)*.....44

*Cantwell v. Connecticut,*
*310 U.S. 296 (1940)*.....41,50

*Carey v. Brown,*
*48 U.S.L.W. 4756*
*(U.S. June 20, 1980)*.....38

*Chess v. Widmar,*
*--F.2d--, (8th Cir. 1980)*
*rev'g. 480 F.Supp. 907*
*(W.D. Mo. 1979)*.....7,8,25,37,44n.6,47

*Cintron v. State Board of Education,*
*384 F.Supp. 674 (1974)*.....44

*Commissioner v. Leyden,*
*358 Mass. 766, 267 N.E. 2d*
*226 (1971)*.....26n.4

*Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 1973).....32*

*Committee for Public Education and Religious Liberty v. Regan 444 U.S. 646 (1980).....26*

*Dittman v. Western Washington University No. C79-1189V (W.D. Wash. Feb. 27, 1980).....7*

*Dixon v. Beresh, 361 F.Supp. 253 (E.D. Mich. 1973)....47*

*Engel v. Vitale, 370 U.S. 421 (1962).....15,30*

*Everson v. Board of Education, 330 U.S. 1 (1947).....10,30*

*Fowler v. Rhode Island, 345 U.S. 67 (1953).....37,38,48*

*Garvin v. Roenaw, 455 F.2d 233 (6th Cir. 1972).....47*

*Healy v. James, 408 U.S. 169 (1972)...32,34,41,44,45,46*

*Holt v. Thompson, 66 Wis. 2d 678, 225 N.W.2d 678 (1975).....33*

*ISKCON v. Wolke, 453 F.Supp. 869 (E.D. Wis. 1978).....31*

*Johnson v. Huntington Beach Union High School District, 68 Cal.App. 3d 1, 137 Cal.Rptr. 43 (1977), cert. den., 434 U.S. 877 (1977).....8,23,40*

*Keegan v. University of Delaware*,
349 A.2d (Del. 1975) cert. den.
424 U.S 934 (1976).....7,24,37

*Kent v. Commissioner*,
--Mass.-- (1980) (No. 2087).....26n.4

*Kunz v. New York*,
340 U.S. 290 (1951).....37,41

*Lawrence Univ. Bicentennial Comm'n v. City of Appleton*,
409 F.Supp. 1319
(E.D. Wis. 1976).....43,44

*Lemon v. Kurtzman*,
403 U.S. 602 (1971).....14,26

*Mangold v. Gallatin*,
438 F.2d 1194 (3rd Cir. 1971).....26n.4

*Martin v. City of Struthers*,
319 U.S. 141 (1943).....31

*McCollum v. Board of Education*,
333 U.S. 203 (1948).....6,17

*McDaniel v. Paty*,
435 U.S. 618 (1978).....12,13,50

*Meek v. Pittinger*,
421 U.S. 349 (1975).....32

*Murdock v. Pennsylvania*,
319 U.S. 105 (1943).....41

*Nebraska Press Ass'n v. Stuart*,
427 U.S. 539 (1976).....35

*New York Times Co. v. United States*,
403 U.S. 713 (1971).....35

*Niemotko v. Maryland*,
*340 U.S. 268 (1951)*.....15,31,37,38

*Police Dept. of Chicago v. Moseley*,
*408 U.S. 92 (1972)*.....38

*Poulous v. New Hampshire*,
*345 U.S. 395 (1953)*.....37

*Reed v. Van Hoven*,
*237 F.Supp. 48*
*(W.D. Mich. S.D. 1965)*.....8,20,21,40

*Resnick v. East Brunswick Town Board of Education*,
*77 N.J. 88, 389 A.2d 944 (1978)*.....8,22

*Roemer v. Board of Public Works*,
*426 U.S. 736 (1976)*...11,13,29,32,33,36

*Saia v. New York*,
*334 U.S. 558 (1948)*.....14,31,41

*Scoville v. Board of Education*,
*425 F.2d 10 (7th Cir. 1970)*.....44,47

*Sherbert v. Verner*,
*374 U.S. 398 (1963)*.....50

*Sloan v. Lemon*,
*413 U.S. 825 (1973)*.....32

*Smith v. University of Tennessee*,
*330 F.Supp. 777*
*(E.D. Tenn. 1969)*.....44

*Snyder v. Board of Trustees of University of Illinois*,
*286 F.Supp. 927*
*(N.D. Ill. 1969)*.....44

*Stacy v. Williams*,
*306 F.Supp. 963 (N.D. Miss.1969)..25,44*

*Stein v. Oshinsky*,
*348 F.2d 999 (2d Cir. 1965).....26n.4*

*Stone v. Graham*,
*49 U.S.L.W. 3369 (Nov. 18, 1980) (per curiam).....15*

*Sullivan v. Houston Independent School District*,
*307 F.Supp. 1328 (S.D. Texas 1969).....43*

*Tinker v. Des Moines Independent Community School District*,
*393 U.S. 503 (1969).....34,41,42,47*

*Trietley v. Board of Education*,
*409 N.Y.S. 2d 912 (1978)..... 7,26*

*Tucker v. Texas*,
*326 U.S. 517 (1946).....37*

*United States v. Ballard*,
*322 U.S. 78 (1944).....48*

*United States v. Boesewetter*,
*463 F.Supp. 370 (D.D.C. 1978).....31*

*United States v. Seeger*,
*380 U.S. 163 (1965).....48*

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the Northern District of New York, rendered on April 16, 1980, has been reported. *Brandon v. Board of Education of Guilderland, 487 F.Supp. 1219 (N.D.N.Y. 1980)*

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 17, 1980. This petition for certiorari was filed within ninety (90) days of that date. No petition for rehearing was filed with the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment I*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*United States Constitution, Amendment XIV, Section I*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*United States Code, Title 42, Section 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

At the time this action for declaratory and injunctive relief, damages and other costs was instituted, Respondents' uniformly permitted students, teachers and members of the public to conduct meetings on school property without prior censorship. Petitioners [hereinafter the "Students for Voluntary Prayer" or "the Students"], acting pursuant to the requirements of a resolution of the respondent Board of Education which allowed students to meet "at authorized times and places on a voluntary basis, with like-minded fellow students, for spiritual or religious conversations or activities ...without participation or involvement of school staff," sought permission to meet on school property for religious conversation and prayer during times of the day when school was not in session.

The Board refused, and the students commenced this action. Jurisdiction in the District Court was based upon the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C.§§ 1343(3), 2201-2, and 42 U.S.C.§ 1983.

The record before the District Court was, in all respects material to this Petition, undisputed. The petitioners believe they have an obligation each day to engage in prayer and that God has directed them to join together and pray as a group. (R. Joint App. pp. 10-11, 24)[1] In keeping with that belief, they formed the "Students for Voluntary Prayer" and planned to meet on the school grounds in the mornings before the beginning of home

---

[1] All citations to the record below are to the Joint Appendix filed by counsel for the students and the Board of Education with the Court of Appeals for the Second Circuit.

room and class instruction or after school.

Their activities were to be completely voluntary and were open to participation by any interested student. Their independence from all official school functions was emphasized by the fact that they did not seek official recognition of their activity or seek assistance, supervision supervision, or participation of the faculty or staff. (R. Joint App. at pp. 8,10,35,36,37,40) They offered to provide volunteer adults if the Board of Education deemed supervision necessary. (R. Joint App. at p. 8)

Respondent Ciaccio denied the request for an authorized meeting place in writing on September 23, 1978. (R. Joint App. at p. 8). This denial was made an official action of the Board of Education on

December 19, 1978. The effect of the denial was to prohibit petitioners from meeting.

At official Board meetings held on February 22, 1979 and March 6, 1979, students Rogers and Smith renewed their request to be permitted to meet in a classroom during non-school hours (R. Joint App. at pp. 9, 22, 36), but those requests were denied by Board resolution on March 6, 1979, (R. Joint App. at p. 38), notwithstanding the fact that the Board of Education allowed students, teachers, and members of the public to conduct meetings on school property during non-instructional hours. (R. Joint App. at pp. 10, 15-18) This lawsuit was filed shortly thereafter alleging that the Board's refusal constituted a violation of their First Amendment rights to free exercise of religion, freedom of speech

and association, and the right to equal protection under the law. No material facts were disputed, and the students moved for summary judgment shortly after the Board answered. Oral argument on the motion was heard by Judge Neal P. McCurn on December 20, 1979.

On April 16, 1980 Judge McCurn dismissed the various procedural defenses raised by the Board and decided the merits of the constitutional issues against petitioners. He held that the Board could not permit students to meet on public school property for religious speech without impermissibly advancing religion under the Establishment Clause and entangling church and state. He dismissed the students' speech and equal protection claims and entered judgment for the Board. *Brandon v. Board of Education of Guilderland, 487 F.Supp. 1219 (N.D.N.Y.*

*1980)* A timely appeal for that decision was filed with the Court of Appeals for the Second Circuit, which affirmed the lower court's decision by opinion on November 17, 1980. (Appendix) This petition for certiorari followed.

## REASONS FOR GRANTING THE WRIT

### I. THE RULINGS BELOW CONFLICT WITH IMPORTANT ESTABLISHMENT CLAUSE PRINCIPLES ARTICULATED BY THIS COURT AND OTHER LOWER COURTS.

Since the landmark decisions in *Zorach* v. *Clauson, 343 U.S. 306 (1952)*[2] *and McCollum* v. *Board of Education, 333 U.S. 203 (1948)*,[3] many public

---

2 Upholding a public school program which allowed students to be released during class hours to obtain religious instruction elsewhere. *See Part I (A) infra.*

3 Striking down a relese time program where religious instruction was offered by teachers on the school property during regular class hours. *See Part I(A) infra.*

school districts throught the country have taken positions which summarily ban religious speech and activity by students on schcol property without regard to the degree to which the state or its employees are involved. *Compare, e.g., Dittman v. Western Washington University, No. C79-1189V (W.D. Wash. Feb. 27, 1980), appeal docketed, No. 80-3120 (9th Cir., April 7, 1980); Trietley v. Board of Education, 409 N.Y.S. 2d 912 (1978); Opinion of the Tennessee Attorney General #201 (Nov. 1, 1980) with, e.g., Chess v. Widmar, --F.2d-- (8th Cir. 1980), rev'g, 480 F.Supp. 907 (W.D. Mo. 1979), petition for cert. filed, 49 U.S.L.W. 3353 (November 11, 1980) (No. 80-689); Keegan v. University of Delaware, 349 A.2d 14 (Del. 1975), cert. den., 424 U.S. 9334 (1976).* The decisions of the courts below and the respondent Board of Education which pro-

hibit students from meeting voluntarily in Guilderland High School to discuss religious issues and to pray, either immediately before commencement of home room and classes, or immediately after the close of the school session are examples of such summary prior restraints.

However, the decisions are not uniform. In contrast, to the decisions below, several courts have upheld the constitutionality of programs identical to the one proposed by the students in this case. *Reed* v. *Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965); Johnson* v. *Huntington Beach Union High School Dist., 68 Cal.3d 1, 137 Rptr. 43 (1977); Resnick* v. *East Brunswick Township Bd. of Education, 77 N.J. 88, 389 A.2d 944 (1978).* Finally, others have sought to draw distinctions based upon the age of the students involved. *See, Chess* v. *Widmar, supra.*

The Court should grant certiorari to resolve the important constitutional questions raised by the decision of the Court of Appeals below. In practice, it authorizes continuing prior restraints on religious speech and association. In theory, it ignores the fundamental right of millions of students to be free of governmental control of their associations and the free flow of ideas. Review by this Court is necessary to clarify the state of the law regarding extracurricular religious activities by public school students which do not involve participation by the state or its agents.

### A. The Ruling Below Conflicts with Settled Establishment Clause and Principles Governing Neutrality, School Prayer and Religious Release Time Programs Decided by this Court.

The First Amendment to the United States Constitution declares that "Con-

gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This Establishment Clause proscription is made applicable to the states, and, ultimately, to boards of education for public school districts, by operation of the Fourteenth Amendment. *Everson* v. *Board of Education, 330 U.S. 1, 15 (1947)* Although *Everson* held that the Establishment Clause creates a "wall between church and state," 330 U.S. at 18, this Court has subsequently interpreted the clause in a manner which would allow programs such as the one proposed by the petitioners.

This Court has consistently held that the Establishment Clause does not create a hermetically sealed, impermeable wall between government and religion:

> [A] system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. *Roemer* v. *Board of Public Works*, *426 U.S. 736, 745-46 (1976)* (emphasis added).

In defining the permissible zone of church and state interaction, the doctrine of "accommodating neutrality" was articulately stated by the late Justice Douglas in *Zorach* v. *Clausen*, *343 U.S. 306 (1952)* and reaffirmed by Chief Justice Burger in *Walz* v. *Tax Commission*, *397 U.S. 664, 669 (1970)*.

> When the state encourages religious instruction or cooperates with religious authorities by adjusting

> the schedule of public events to sectarian needs, it folows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs. *Zorach v. Clausen, supra, 343 U.S. at313-14.* (emphasis supplied)

It is precisely such accommodating neutrality which the students seek in this case. They merely ask to be accorded the same right as other groups to meet on school property before the bell for the first class in the morning (home room) or after the close of the school day when instruction and classes are over. (R. Joint App. at pp. 8, 10, 35, 36, 37, 40).

In *McDaniel v. Paty, 435 U.S. 618, 641 (1978)* Justice Brennan concurring stated that the "Establishment Clause properly understood, is a shield against any attempt by government to inhibit re-

ligion as it has done here; ...It may not be used as a sword to justify repression of religion or its adherents from any aspect aspect of public life." (footnote omitted). The Court of Appeals ignored that statement and held that "[w]hile students have First Amendment rights to political speech in public schools, [citation omitted], sensitive Establishment Clause considerations limit their right to air religious doctrines." (Ap. at A-18).

In spite of the principles already summarized and the holdings of *McDaniel* and *Roemer* that "[r]eligious institutions [and individuals] need not be quarantined from public benefits that are neutrally available to all," 426 U.S. at 746, the courts below determined that voluntary student meetings would run

afoul of the three-pronged test for "establishment" developed in *Lemon* v. *Kurtzman*, *403 U.S. 602 (1971)*.

Professor Laurence Tribe described such an accommodating neutrality in a public educational context in his recent treatise on constitutional law. He noted that school buildings are similar to other public forums when they are not being used for instructional purposes. In essence, they are "surplus land":

> Thus, if the state allowed all charitable groups to use school buildings free of charge during such periods (and others to use the buildings for a fee) to exclude religion [would not be an establishment of religion and] might violate free exercise. *Tribe, American Constitutional Law at 825 n.12* (1978).

Similarly, this Court has approved the use of public places as a forum for religious activities. *See Saia* v. *New*

*York, 334 U.S. 558 (1948); Niemotko* v. *Maryland, 340 U.S. 268 (1951). See generally, Part II infra.*

A brief examination of school prayer cases previously before this Court illustrates these principles. In *Engel* v. *Vitale, 370 U.S. 421 (1962)* this Court struck down school board regulations which affirmatively *required* daily morning ceremonies in the classrooms consisting of the repetition of a non-denominational prayer which was composed by the state. In *Abington School District* v. *Schempp, 374 U.S. 203 (1963)* this Court struck down *required* daily Bible reading in the classroom followed by student recitation of the Lord's Prayer. In *Stone* v. *Graham, 49 U.S.L.W. 3369 (Nov. 18, 1980) (per curiam)*, this Court struck down a Kentucky law which *required* the posting of the Ten Command-

ments in public elementary and secondary school classrooms.

The relevant factors in each of these cases were that the religious activities were *initiated or required by the state, they occurred during the regular school session, and were part of a school-wide,* official program. The state educational system fostered a specific ideological approach to religion and utilized the mandatory school attendance laws to further the religious tenets it had chosen to sponsor during school hours. These cases, however, stand in sharp contrast to the extra-curricular, student-initated, student-controlled, voluntary meetings proposed by the students in the case at bar. The students never sought official recognition for their group. Nor may it be seriously con-

tended that the School Board sponsors or supports each and every position taken by students or citizens who meet on school premises during non-class hours.

The Appeals Court's rigid view of the concept of "sponsorship" flies in the face of both *Zorach v. Clauson, 343 U.S. 306 (1952), and McCollum v. Board of Education 333 U.S. 203 (1948)* by totally ignoring the essential differences between active involvement and passive accommodation or tolerance. In *Zorach*, this Court upheld a public school release-time program which enabled public school children to obtain religious instruction during the course of the school day and rejected arguments that passive accommodation was an impermissible aid to religion. However, in *McCollum* a release-time program similar to that in *Zorach* but where the instruction took place on school premi-

ses, *during school hours*, was held invalid because "the classrooms were used for religious instruction *and the force of the public school was used to promote that instruction*". 343 U.S. at 315 (emphasis added). Notably, the record at bar discloses no evidence whatsoever of enforced participation or of a "captive audience", but the courts below were more than willing to assume that it did.

Because off-campus religious instruction was allowed in *Zorach* during the school day, but on-campus instruction was not, many school boards have adopted the simplistic and mechanistic notion that the only operative fact under the Establishment Clause is the location of the religious activity. Such an approach, however, misses the point so painstakingly made in the cases: a "classroom" is a curriculum teaching unit controlled and

supervised by the state, not merely a geographic location. *See*, Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L.J. 3, 17 (1978) (hereinafter cited as *Religious Student*). L. Tribe, *American Constitutional Law at 825 n. 12 (1978)*

A careful analysis of the cases indicates that the necessary separation of church and state can be achieved by separating the religious activity *in time* and *sponsorship* from day-to-day instruction, as well as by moving the activity to a different location. But the courts below read them to forbid *any* contact with religion during school hours even though [t]he degree of official support of religious activities is greater, ...in the school prayer or religious instruction cases than in the instant case."

Reasoning that mere accomodating is "symbolic" support which would "advance" religion, it affirmed the first content-based prior restraint in a non-pornography or national security case.

B. The Ruling Below Conflicts with the Decisions of Other Federal and State Courts and a Determination by This Court is Necessary to Insure Uniformity On this Important Constitutional Issue.

Although there are no Supreme Court cases directly on point, several lower courts have decided the precise issue before this Court. In a case strikingly similar to the instant one, *Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich 1965)*, a federal court ruled that public school students who wished to say a prayer or read scriptures in the morning before the school day begins and after the school day ends should be permitted to do so.

> The touchstone in both *Engel* and (sic) *Vitale*, *supra*, and *Abington School District* v. *Schempp*, *supra*, was the support given to the practices by the local school authorities. In both cases, the exercises were directed to be held at the opening of the school day. Students who chose not to participate were required to absent themselves at the start of the school period or remain and silently endure a ceremony which violated their constitutional rights. 237 F.Supp. at 53.

Under the plan held constitutional in *Reed*, students wishing to pray or read scriptures would meet in a separate room either before or after the school day and would complete their exercise at least five minutes before the beginning of the regular school day, or begin their activity no sooner than five minutes after the completion of the regular school day. There was to be no special bell signifying the beginning or end of this period and after the completion of the period

there was to be a general commingling of the entire student body on the way to class. The role of teachers was strictly limited to maintaining order and discipline. The program proposed by the students herein would conform precisely with these strictures.

In an analagous situation, a suit was brought in New Jersey state court to prohibit religious groups from renting public school facilities during non-school hours. The East Brunswick, New Jersey Board of Education had a policy of renting the facilities to both non-secular and secular nonprofit groups, and the New Jersey Supreme Court found no violations of the Establishment Clause. *Resnick v. East Brunswick Town Board of Education, 77 N.J. 88, 389 A.2d 944 (1978).*

A similar rule is followed in California. Although a California Court of Appeals held, over a strong dissent, that official *recognition* of a High School Bible Study Club and permission to meet on campus *during the school day* violated the Establishment Clause, *Johnson* v. *Huntington Beach Union High School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977).* The parties in *Huntington Beach* stipulated that permission would be denied *only* if the meeting:

> was proposed to be held at any time during the school day (i.e., at any time between the time that students are first required to report their attendance in the morning until the last class is dismissed in the afternoon). Stipulation 21, 137 Cal. Reptr. at 53.

Thus, even the *Huntington* majority would have permitted the proposed before-school religious activity denied in the

instant case by the Guilderland Board. *See, 137 Cal. Reptr. at 46, n. 4.* Indeed, the State Civic Center Act required that schools be open to all charitable groups during off-school hours. 137 Cal. Reptr. at 53 n.2. The dissent in *Huntington* would have allowed the recognition of the Bible Club and permitted it to meet during the school day.

In *Keegan v. University of Delaware, 349 A.2d 14 (Del.1975), cert. denied 424 U.S. 934 (1976)*, the Delaware Supreme Court reviewed a university regulation which prohibited student use of space in campus buildings for worship services. The University allowed business meetings and special programs in the same area. The Court held that the Establishment Clause did not require the University to prohibit religious worship in campus dor-

mitories, such a policy would be neutral and could not have the primary effect of advancing education by allowing students to meet together to exchange ideas and share mutual interests. In that sense, there would be no primary advancement of religion. 349 A.2d at 16. *Accord Chess v. Widmar, --F.2d-- (8th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3353 (Nov. 11, 1980) (No. 80-689), rev'g. 480 F.Supp. 907 (W.D. Mo. 1979). See also Stacy v. Williams, 306 F.Supp. 963, 975 & n.28 (N.D. Miss. 1969)* (three judge court) (University of Mississippi regulation banning religious meetings or gatherings on campus unconstitutional); *Wood v. Mt. Lebanon Township School, 342 F.Supp. 1293 (W.D. Pa. 1972)* (Invocation and benediction by clergyman at voluntary high school graduation ceremony does not violate Establishment Clause).

Notwithstanding these decisions, the courts below followed an intermediate New York decision, *Trietley v. Board of Education*, *409 N.Y.S. 2d 912 (1978)*, and held that allowing the students' to meet violated the Establishment Clause.[4] Supreme Court resolution of the conflict is necessary to insure that public high school students throughout the United States are treated equally regarding this important constitutional issue.

---

4 Other cases cited by the Board of Education are inapposite. *Stein* v. *Oshinsky*, *348 F.2d 999 (2nd Cir. 1965)* held that kindergarten students were incapable of free exercise of religion without teacher assistance. *Mangold* v. *Gallatin*, *438 F.2d 1194 (3rd Cir. 1971)*, *Commissioner* v. *Leyden*, *358 Mass. 776, 267 N.E. 2d 226 (1971)*, *and Kent* v. *Commissioner* ___ *Mass.* ___ *(1980) (Case No. 2087)* all involved active school sponsorship of prayer by students in the classroom after commencement of the school day.

### C. The Appellate Court Misapplied the Tripartite Test of *Lemon* v. *Kurtzman* by Banning Student-Initiated Religious Speech and Association

In *Lemon* v. *Kurtzman*, *403 U.S. 602 (1971)*, this Court held that a governmental action is constitutional under the Establishment Clause if the action has "a secular legislative purpose;... its principal or primary effect must be one that neither advanes nor inhibits religion; [and], the statute [or action does] not foster an excessive government entanglement with religion." 403 U.S. at 612-613. *See also Committee for Public Education and Religious Liberty* v. *Regan*, *444 U.S. 646, 653 (1980)*.

#### 1. *The Relief Requested was Secular in Nature and Religiously Neutral in both Purpose and Effect.*

Although the court below correctly noted that "[a] neutral policy granting

all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose, the encouragement of extracurricular activities," (App. at A-13) it found that the second and third prongs of the test would be violated by permitting students to communicate religious ideas to interested fellow students. In the appellate court's view, the "prayer meetings would create not only an improper appearance of official support ... impermissibly advancing religion...", but also create unconstitutional entanglement between church and state. (App. at A-16) Notably absent from the Court's analysis, however, was either a review of the undisputed evidence that the state was *not* to be involved or an express finding of a factual justification for its ruling sufficient to overcome the

"heavy presumption" against the Constitutional validity of any prior restraint or expression. *Organization for a Better Austin v. Keefe, 402 U.S. 415, 419* (1971)

In *Roemer v. Board of Public Works, 426 U.S. 738 (1976)* this Court upheld categorical grant programs to religiously affiliated schools, stating that:

> *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect of facilitating religious activity."* 426 U.S. at 747 (emphasis added).

The "aid" cited by the District Court in its opinion --free use of building, lights, and heat -- is clearly incidental within the meaning of other decisions of this Court which have upheld the right of those who exercise their rights to communicate religious messages to share in

public benefit made equally available to all. *See, Everson v. Board of Education, 330 U.S. 1 (1947)*, (school busing); *Board of Education v. Allen, 392 U.S. 236 (1968)* (textbooks).

As frankly admitted by the Court of Appeals, the passive allowance of voluntary student meetings on school grounds during non-school hours simply does not rise to the level of "outward appearances of official state sanction" that would exist where government provides tangible support to religious activity. (App. at A-15). *See, e.g., Engel v. Vitale, supra.*

If meetings of religiously-oriented students compelled to be present on school property can be banned because of the "no-aid" principle, the mere use of public property, lighting or heat would

be sufficient to validate prior restraints on religious speech as preventing "symbolic" aid. *But see, Saia* v. *New York, 334 U.S. 558 (1948); Niemotko* v. *Maryland, 340 U.S. 268 (1951) and Martin* v. *City of Struthers, 319 U.S. 141 (1943); ISKCON* v. *Wolke, 453 F.Supp. 819 (E.D. Wis. 1978); United States* v. *Boesewetter, 463 F.Supp. 370 (D.D.C. 1978).* It is inconceivable that the Constitution sanctions such an approach.

2. *The Relief Requested Would Not Have Resulted in Impermissible Administrative or Doctrinal Entanglement.*

The only factual circumstances in which this Court has struck down government action pursuant to the entanglement test involved statutes which earmarked large sums of tax funds for private and church-related schools to ensure that the funds were not utilized in the religious

activities of the school. In each case continuing *government administrative surveillance* of the inner workings of religious institutions was deemed necessary. *See Roemer v. Board of Public Works, 426 U.S. (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).* That test has no applicability to a religiously-oriented student meeting on school property during non-school hours.

Even if the Students for Voluntary Prayer *had* official recognition by the School Board in the instant case, this Court's cases would not support the decision below. *See, Healy v. James, 408 U.S. 169 (1972).* The filing of periodic reports respecting a club's activities does not cause unconstitutional entangle-

ment. *See, Roemer v. Board of Public Works, 426 U.S. 736, 763-764 (1976); Holt v. Thompson, 66 Wis. 2d 678, 225 N.W. 2d 678 (1975)* (release-time program reports) In the instant case, the respondent Board of Education need only have involved itself in petitioners' activity to the degree necessary to avoid disruption. No financial aid was sought. No monitoring of the program was needed other than that which is normally exercised when other student groups utilize school property during off-school hours. These petitioners made every effort to avoid the Board's legal objections, including an offer to provide volunteer adult monitors acceptable to the Board. A review of the decision below, however, clearly discloses that it was the content of the intended speech -- not entanglement-- which resulted in the rejection of petitioners' claims.

## II. THE DECISION BELOW SUBORDINATES SETTLED PRINCIPLES OF FREEDOM OF SPEECH, FREEDOM OF ASSOCIATION, FREEDOM OF RELIGION, AND EQUAL PROTECTION TO AN OVERBROAD AND CLEARLY ERRONEOUS CONSTRUCTION OF THE ESTABLISHMENT CLAUSE

### A. Free Speech and Equal Protection

It is now settled that students do not automatically relinquish their constitutional rights at the public schoolhouse door. *See, e.g., West Virginia State Board of Education* v. *Barnette, 319 U.S. 624, 630-641 (1943)* (freedom of religion); *Tinker* v. *Des Moines Independant Community School District, 393 U.S. 503, 506 (1969)* (freedom of speech); *Healy* v. *James, 408 U.S. 169, 181 (1972)* (freedom of association).

In the case at bar, the Court of Appeals for the Second Circuit has held that the Board of Education must refuse

to allow students to meet on the school premises during non-school hours because the *content* of students' intended speech is not suitable in the public school environment. Such action unquestionably constitutes a prior restraint which prevents privately-initiated speech from making its way into the marketplace of ideas on the basis of content. This Court has consistently warned that "any system of prior restraints, comes to this court bearing a heavy presumption against its validity." *Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1968); New York Times Co. v. United States, 403 U.S. 714, 715 (1971) (per curiam); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976). See generally* Tribe, *supra* at 724-731. Regulating speech on the basis of content is justifiable only when it creates a "clear and present danger" of

causing a substantive evil which the government has a right to avoid. *Id.* No such justification exists in this case.

By definition, non-governmental acts cannot constitute an "establishment of religion" without some showing of active government involvement. *See Part I, supra.* Nevertheless, the Court of Appeals incorrectly relied upon establishment of religion as the "evil" which mandates disparate treatment and prior restraint of student religious speech. (App. at A-14).

This Court of Appeals decision is in direct contravention of *Roemer v. Board of Public Works, 426 U.S. 736,746 (1976)* and other decisions which hold that religious groups have a right of equal access to public forums for meetings, prayer, and religious discussion. The Court of

Appeals has mandated the quarantine of religious speech and ideas from a forum which is freely available to students for other types of speech before, during and after the school day and to non-students during non-school hours. *Niemotko* v. *Maryland, 340 U.S. 268 (1951)* (Jehovah's Witnesses have a right to use park for Bible talks); *Kunz* v. *New York, 334 U.S. 558 (1948)* (religious groups have right to equal access to parks and streets for their religious activities). *Poulos* v. *New Hampshire, 345 U.S. 395 (1953); Tucker* v. *Texas, 326 U.S. 517 (1946); Fowler* v. *Rhode Island, 345 U.S. 67 (1953); Chess* v. *Widmar, --F.2d--(8th Cir. 1980), petition for cert. filed 49 U.S.L.W. 3353 (Nov. 11, 1980) (No. 80-689); Keegan* v. *University of Delaware, 349 A.2d 14 (Del. 1975), cert. denied 24 U.S. 934 (1976)* (worship in

dormitory "commons room" at state university).

As recently as 1972, this Court affirmed *Niemotko* and *Fowler* in *Police Department of Chicago* v. *Mosley*, *408 U.S. 92 (1972)*, twice emphasizing that the earlier cases involved religious activities on public property. 408 U.S. at 96-97 (1972).

In *Mosley*, this Court affirmed the freedom of speech and equal protection principles of its earlier public cases by striking down a city ordinance which allowed only labor groups to picket within 150 feet of public school buildings. In language which is applicable to the instant case, it was held that the ordinance unconstitutionally discriminated against non-labor picketing on the basis of subject matter:

> ...Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities... *Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.* 408 U.S. at 96. (Emphasis added). *Accord, Carey v. Brown, 48 U.S.L.W. 4756 (U.S. June 20, 1980)*

Since allowing speakers to use public school property during non-school hours makes it a public forum during those periods to various speakers makes it a public forum under the First Amendment it is difficult to understand the court below's finding that a public high school during non-school hours is not a public forum. (App. at p. A-17,18). In this case, the high school is open for use by a multi-

tude of student and citizen groups. (R. Joint Ap. at pp. 15-18). The Court of Appeals' focus on the operation of busses, the presence of school personnel, and provision of utilities does not change the nature of the forum -it is a public forum as long as instruction is not being given. *See, Reed v. Van Hoven, 237 F.Supp. 48, 54-56 (W.D. Mich. 1965); Johnson v. Huntington Beach Union High School District, 137 Cal. Reptr. 43, 53 (1977)* (interpreting the State Civic Center Act); *Bonner-Lyons v. School Committee of Boston, 480 F.2d 442, 444 (1st Cir.1973)* (public school information network of "public forum" once opened to expression of views of one group). In this respect, a high school, during non-school hours, is identical to a college or university.

Moreover, other courts which have considered the issue agree that a high school is a forum for student free speech. *Tinker* v. *Des Moines Independent School District*, *393 U.S. 503, 511, 513 (1969)*.

Finally, contrary to the holding below (App. at A-12, 19) this Court has never held that the availability of an alternate forum for a religious speaker is grounds for denying the speaker access to a public forum open to other groups. *See, e.g., Cantwell* v. *Connecticut, 310 U.S. 296 (1940); Healy, supra; Murdock* v. *Pennsylvania, 319 U.S. 105 (1943); Kunz* v. *New York, supra; Saia* v. *New York, supra,* and *Tinker* v. *Des Moines, supra.* Thus, the fact that petitioners might be able to gather elsewhere for their meeting is constitutionally

irrelevant.[5]

However, petitioners have never argued that respondents are prevented from regulating time, manner and place of student student free speech in the school building. In *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*, a Court upheld the wearing of armbands by public school students *during school hours* in protest of the Vietnam War. Although students have a right to express their views "in the absence of a specific showing of constitutionally valid reasons to regulate their speech...," 393 U.S. at 505-06.

The court directly addressed the time, manner and place restrictions which

---

[5] The students were, in any event, attending high school pursuant to the mandatory attendance laws of the State of New York. (R. Joint App. at p. 6)

The court directly addressed the time, manner and place restrictions which would be valid:

> conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. 393 U.S. at 513.

In short, "freedom of speech may be exercised to its fullest potential on school premises as long as it does not unreasonably interfere with normal school activities." *Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340 (S.D. Texas 1969). Accord, Lawrence University Bicentennial Comm'n. v. City of Appleton, 409 F.Supp. 1319 (E.D. Wis. 1976)*[6]

---

6 Federal courts have consistently invalidated total bans of religious
(continued on following page)

B. Associational Rights

Since the landmark decision of *Healy* v. *James*, *408 U.S. 169 (1972)*, this Court has also recognized that the right

---

speech on public school property. *See, e.g.,Chess* v. *Widmar, supra; Stacy* v. *Williams, 306 F.Supp. 963, 975 n. 28 (N.D. Miss. 1969) (three judge court); Cintron* v. *Board of Education, 384 F.Supp. 674, 679 (D.P.R. 1974); Lawrence University Bicentennial Commission* v. *City of Appleton, 409 F.Supp. 319, 322-24 (E.D. Wis. 1976)*

Similarly, the Courts have invalidated regulations which punish or ban other forms of speech based on their content, and not their potential for causing a "clear and present danger." *Scoville* v. *Board of Education, 425 F.2d 10 (7th Cir. 1970) (en banc); Wilson* v. *Chancellor, 418 F.Supp. 1358 (D. Ore. 1976)* (ban on all political speakers on campus unconstitutional); *Smith* v. *University of Tennessee, 300 F.Supp. 777, 783 (E.D. Tenn. 1969)* (ban on controversial speakers unconstitutional). *Accord Brooks* v. *Auburn University, 296 F.Supp. 188 (M.D. Ala. 1969); Snyder* v. *Board of Trustees of University of Illinois, 286 F.Supp. 927, 933 (N.D. Ill. 1969).*

of "freedom of association" is inherent in a student's First Amendment freedoms. 408 U.S. at 181. In *Healy*, this Court reviewed a public college's refusal to grant recognition to a local chapter of Students for a Democratic Society (SDS) which was endeavoring to become an official student organization.

School officials argued there was no constitutional action by the school because the students could meet as a group and distribute material off campus. 408 U.S. at 182-18. But the court found otherwise:

> Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and - most importantly - non-recognition barred them from using campus facilities for holding meetings. 408 U.S. at 176.

Notably, even these indirect effects on First Amendment association rights were sufficient to call into play the First Amendment.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Id.* at 183.

In this respect *Healy* is entirely consistent with the pubic forum cases, discussed in detail previously, which unequivocably hold that forums open to certain groups must be made available to all -- including religious groups. But since the Petitioners here in did not even seek official recognition of their activities, there can be no question that the *entire* focus of the Court of Appeals was the content of the intended speech and the reasons for the intended association. It thereby carved out a major

exception to the settled rules established by *Tinker* and *Healy* and placed itself squarely in conflict with two other circuits on the question of the speech and associational rights of high school students. *See, Scoville* v. *Board of Education, 425 F.2d 10, 13, N.5 (7th Cir. 1975) (en banc); Garvin* v. *Roenaw, 455 F.2d 233 (6th Cir. 1972); Dixon* v. *Beresh, 361 F.Supp. 253, 254 (E.D. Mich. 1973). Compare, Chess* v. *Widmar, supra,* (arguing that while college students may associate and speak freely respecting religious themes, high school students may not).

C. Free Exercise

It is beyond cavil that the petitioners' requests to be allowed to use a classroom during non-school hours each day for religious speech were based on sincerely held religious belief protected by the free exercise clause of the First Amendment.[7] The students alleged that they believe they owed their entire existence to God and were required to join together as a group to acknowledge their belief in God. (App. pp. 10-11) It is undisputed that they are required to attend school by the New York statutes

---

[7] *See United States v. Ballard, 322 U.S. 78 (1944); United States v. Seeger, 380 U.S. 163 (1965); and Fowler v. Rhode Island, 345 U.S. 67 (1953)* where this Court held that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the first amendment." 345 U.S. at 69.

mandating compulsory education, N.Y. Educ. Law §§3201-3234, and that they believe communal prayer, prior to starting the school day or at its close, is one of the most important ways to exercise their beliefs. No one has questioned their sincerity. Their requests were not denied because the Students for Voluntary Prayer appeared insincere, but because the school officials, acknowledging the religious character of the students meeting proposal, felt that approval would constitute advancement of religion contrary to the Establishment Clause. (R. Joint App. at p. 27).

In order to proscribe the students' free exercise rights the school board was compelled to demonstrate that they had a compelling state interest in such action and no less restrictive means of achiev-

ing that goal. *Sherbert v. Verner, 347 U.S. 398 407 (1963). Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).* However, the Courts below lifted this burden by holding that the Establishment Clause provided the compelling interest. Since it has been demonstrated that private religiousspeech, regardless of its location, cannot constitute an establishment of religion, the need for the state to avoid aid to religion cannot serve as compelling support for the prior restraints imposed below. *McDaniel v. Paty, supra.* Notwithstanding the opinion of the court below, neither the availability of alternative forums nor the lack of identity between the proposed prayer meeting and institutional ritual negates the requirement that the School Board must accommodate the proposed practice. *Cantwell v. Connecticut, supra. But see*

Appendix at A-11. The School Board must accommodate religious practices where there is no compelling interest in excluding them. Since no other compelling reason has been offered by either the Board of Education of the Court of Appeals, the writ should be granted and the decision below reversed.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: February 16, 1981

Respectfully submitted,

ROBERT ANTHONY DESTRO
for the Catholic League
for Religious and
Civil Rights
1100 W. Wells Street
Suite 501A
Milwaukee, WI 53233
(414) 289-0170

ROBERT MICHAEL ANDERSEN
2650 North Lakeview
Chicago, ILL 60614
(414) 289-0170

ROBERT P. ROCHE
90 State Street
Room 1436
Albany, NY 12207
(518) 463-1193

Attorneys for Petitioners

By: /s/ Robert A. Sedler

OF COUNSEL:

Eva M. Soeka

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 291—September Term, 1980

(Argued October 28, 1980 Decided November 17, 1980)

Docket No. 80-7382

JEANNE BRANDON, *et al.*,

*Appellants,*

—against—

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, *et al.*,

*Appellees.*

Before:

KAUFMAN, KEARSE and BRIGHT,*

*Circuit Judges.*

Appeal from a judgment of the United States District Court for the Northern District of New York, Neal G.

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

McCurn, *Judge*, granting summary judgment in favor of defendants, and dismissing complaint by high school students claiming that refusal of defendants to grant them the use of a classroom for voluntary communal prayer meetings immediately prior to commencement of the school day violated their First Amendment rights to the free exercise of religion.

Affirmed.

---

ROBERT M. ANDERSON, ESQ., Chicago, Illinois (Robert P. Roche, Albany, New York, David M. Fleming, Catholic League for Religious and Civil Rights, Milwaukee, Wisconsin, of counsel), *for Appellant*.

C. THEODORE CARLSON, ESQ., Albany, New York (Tabner, Carlson, Daffner and Farrell, Albany, New York), *for Appellees*.

LEO PFEFFER, ESQ., New York, as *Amicus Curiae* for the American Jewish Congress, American Jewish Committee, Anti-Defamation League of B'nai B'rith, Central Conference of American Rabbis, Jewish Labor Committee, Jewish War Veterans of the U.S.A., Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Relations Advisory Council in behalf of the one hundred and eight Jewish Community Councils throughout the United States.

---

KAUFMAN, *Circuit Judge*:

To many Americans, the state's noblest function is the education of our nation's youth. We entrust this responsibility largely to the public schools, and hope our children grow into responsible citizens by learning the enduring values of Western Civilization we all share—an appreciation of critical reasoning, a commitment to democratic institutions, and a dedication to principles of fairness. In this immigrant nation of dreamers and dissidents, however, no broad consensus regarding the spiritual side of the human condition exists. Our Founding Fathers recognized the disharmony and drafted the Bill of Rights to require the separation of church and state. Accordingly, religious activity under the aegis of the government is strongly discouraged, and in some circumstances—for example, the classroom—is barred. The sacred practices of religious instruction and prayer, the Framers foresaw, are best left to private institutions—the family and houses of worship. In short, logic, tradition, and law create in our nation a "wall between church and state," *Everson v. Board of Education,* 330 U.S. 1, 18 (1947). In this case, brought by students seeking to force a public school to allow joint prayer sessions in the school before classes begin, we are asked to dismantle that wall. Because the First Amendment does not require—or even allow—such permission, we affirm the dismissal below of the students' complaint.

I.

Questions of religious freedom can depend on sensitive issues of fact, and we turn first to the particular circumstances in which this case arose. In 1978, several students at Guilderland High School organized a group called

"Students for Voluntary Prayer." They sought permission in September 1978 from the school's principal, Charles Ciaccio, to conduct communal prayer meetings in a classroom immediately before the school day commenced. The group noted that it was not seeking supervision or faculty involvement, and stated that its activities were voluntary and would not conflict with other school functions.

The principal denied the request by letter dated September 23, 1978. Shortly thereafter, the Superintendent of the Guilderland School District refused permission. The Guilderland Board of Education voted on December 19, 1978, and again on March 6, 1979, to deny the group's request. Six students[1] filed suit in June 1979 individually and on behalf of those students similarly situated. They stated in the complaint that the defendants—the Board of Education and its individual members, the Superintendent of the school district, and Ciaccio, the principal—violated their First and Fourteenth Amendment rights to the free exercise of religion, freedom of speech, freedom of association, and equal protection. The students sought declaratory relief and requested the court to enjoin the defendants from denying them a classroom for their prayer meetings. The complaint prayed for monetary damages as well.

On April 16, 1980, Judge McCurn granted summary judgment for the defendants, holding that the students

---

[1] Three of the six plaintiffs—Jeanne Brandon, Jill George, and William Smith—were minors when the action was commenced and were represented by their parents or legal guardians. All of the plaintiffs have since graduated from Guilderland High School. No mootness problem exists, however, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), because the students were acting in a representational capacity for members of the "Students for Voluntary Prayer." *See Trachtman v. Anker*, 563 F.2d 512, 514 n.1 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). Moreover, their claim for monetary damages remains extant.

were not entitled to relief as a matter of law and dismissing the complaint. After addressing several procedural points,[2] the court found that the Establishment Clause of the First Amendment barred the school from permitting the students to conduct prayer meetings in a classroom. Applying the tripartite test for Establishment Clause analysis formulated by the Supreme Court, *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), Judge McCurn found that while a school's decision involving the use of school premises might have a secular pupose, the granting of the group's request would have had the impermissible effect of advancing religion. In addition, if the prayer meetings were conducted, an excessive entanglement between a supposedly secular school and clearly religious activities would result because faculty surveillance would be needed to assure that the meetings were voluntary.

Further, Judge McCurn found the school's refusal did not violate the students' rights freely to exercise their religious beliefs. Moreover, even if some infringement occurred, the compelling state interest in maintaining the separation between church and state justified that restriction. Judge McCurn also rejected the students' freedom of speech and association arguments. Finally, the court

---

2 Judge McCurn correctly held that the plaintiffs' failure to present a written verified complaint to the school officials within three months after the accrual of their claim, required by New York Educ. Law § 3813(1)(McKinney) as a condition precedent to the commencement of non-tort suits against a school district, did not necessitate dismissal of the complaint. He found that compliance with the notice requirement is not mandatory in civil rights actions brought pursuant to 42 U.S.C. § 1983. *See Paschall v. Mayone*, 454 F. Supp. 1289, 1298 (S.D.N.Y. 1978); *Glover v. City of New York*, 401 F. Supp. 632, 635 (E.D.N.Y. 1975); *Carrasco v. Klein*, 381 F. Supp. 782, 787 n.12 (E.D.N.Y. 1974); *Laverne v. Corning*, 316 F. Supp. 629, 637 (S.D.N.Y. 1970).

found that the Equal Protection Clause of the Fourteenth Amendment did not require a religious organization to be treated in a manner similar to the secular student groups permitted to use the school's facilities. The students appeal the dismissal of their complaint.

II.

The First Amendment's language protecting religious freedom is both crisp and elegant: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." While the ambiguities of history prevent us from determining exactly how the Founding Fathers intended the Establishment and Free Exercise Clauses to interact, coherent themes exist. The Supreme Court's identification and elaboration of doctrine provides guidance to legislators, courts, and even school boards, in an era when the government's regulation of daily life is pervasive and when our nation's religious composition is far more diverse than that of post-Revolutionary America.

First Amendment jurisprudence emerges from a colonial background that reflected varying justifications for the separation of church and state.[3] An evangelical view, associated with Roger Williams, feared the corruptive influence of secular statism on religious purity. Religious freedom and separatism, therefore, were necessary for the protection of the spiritual life. A more worldly school of thought, associated with Jefferson, sought to protect the state from the church, and found that the erection of a "wall of separation," *Everson, supra,* was necessary. The third view, that of James Madison, was that both religion

---

[3] See L. Tribe, *American Constitutional Law* § 14-3 at 816-17 (1978).

and the state would prosper if freed from the undesirable effects each presented to the other.

The Supreme Court has consolidated these historical antecedents[4] to articulate three major policies underlying religious freedom: voluntarism of religious thought and conduct, government neutrality towards religion, and the separation of church and state.[5] Voluntarism recognizes that private choice, not official coercion, should form the basis for religious conduct and belief. *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970)(Harlan, J., concurring). Governmental neutrality reinforces voluntarism, for it assures its citizens, on the one hand, that no official imprimatur lies behind any set of religious beliefs or practices and, on the other, that no particular dogma is officially condemned. *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963); *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Separation is meant to foster voluntarism and neutrality, and also to preserve the integrity of both religion and government. *See Engel v. Vitale, supra*, 370 U.S. at 431.

As the role of government became more pervasive, a tension between principles of voluntarism and separation inevitably emerged. A strict reading of the Establishment Clause's erection of the wall between church and state would require government to refrain from providing even the most essential public services to religious organizations. Such inflexible separation, however, threatens free

---

4 *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 667-72 (1970); *School District of Abington Township v. Schempp*, 374 U.S. 203, 230-42 (1963) (Brennan, J., concurring); *Everson v. Board of Education*, 330 U.S. 1 (1947).

5 Tribe, *supra*, § 14-4 at 818-19; Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 Harv. L. Rev. 696, 697-700 (1979).

exercise, and therefore the principle of neutrality requires the state to provide fire and police services—and even some forms of financial assistance—to religious schools and organizations. *Roemer v. Board of Public Works*, 426 U.S. 736, 746-47 (1976).[6] Accommodation of these three constitutional values is a trying task, but one in which courts are compelled to engage.

III.

When we apply these doctrines—voluntarism, neutrality, and separation—to the facts of this case, we discover that many of the Supreme Court's religion decisions arose in a somewhat different context. Most controversies involving prayer in the schools or the granting of financial assistance to religious schools involved an Establishment Clause challenge to state statutes or regulations' *supporting* religious activity—the recitation of classroom prayers, *School District of Abington Township v. Schempp*, *supra*, the use of school facilities for religious instruction, *McCollum v. Board of Education*, 333 U.S. 203 (1948), and the reimbursement for costs incurred in teaching-related activities, *e.g.*, *Regan*, *supra*; *Lemon v. Kurtz-*

---

6 *See, e.g., Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980)(reimbursement to religious schools for costs in administering statewide standardized tests); *Board of Education v. Allen*, 392 U.S. 236 (1968)(textbook loan program to students of private schools); *Everson v. Board of Education*, *supra* (reimbursement to parents of parochial school students for public transportation costs).

7 The religious freedoms protected by the First Amendment are incorporated in the Fourteenth Amendment, and therefore limit the conduct of state governments as well as the federal government. *Regan*, *supra*, 444 U.S. at 649 n.1 (1980); *Everson*, *supra*, 330 U.S. at 15 (incorporating Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)(incorporating Free Exercise Clause).

*man, supra.* These cases present the question whether the particular state action encouraging religious activity demonstrates an impermissible support of religion and an infringement of the free exercise rights of others who fail to receive similar state support.

This case raises a different problem. The local school board, acting as a duly authorized agent of New York state, New York Educ. Law § 414 (McKinney); *Trietley v. Board of Education,* 65 A.D.2d 1, 5, 409 N.Y.S.2d 912, 915 (1978), *refused* to sponsor religious activity in public schools. The suit was brought by advocates of religious activity, who seek to compel the granting of permission. Our focus, therefore, is to determine whether the school's refusal violated the Free Exercise rights of the "Students for Voluntary Prayer," and exhibited a degree of hostility towards a particular religious organization sufficient to transgress the principle of government neutrality, thereby violating the Free Exercise Clause. Once we examine the implications of the School Board's refusal, we will turn to the Establishment Clause problems that would have arisen had the School Board authorized the holding of voluntary prayer meetings prior to the commencement of the school day.

*A.*

To demonstrate an infringement of his free exercise rights, an individual must show "the coercive effect of the [state] enactment as it operates against him in the practice of his religion." *School District of Abington Township v. Schempp, supra,* 374 U.S. at 223. The analysis need not involve a court in determining the sincerity of one's religious beliefs, *United States v. Ballard,* 322 U.S. 78 (1944), but it does require that the court inquire into the relative importance of a particular religious ritual and the

degree to which exercise of that practice is infringed by government action. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Sherbert v. Verner,* 374 U.S. 398 (1973). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part 1. The Religious Liberty Gurantee,* 80 Harv. L. Rev. 1381, 1390-1423 (1967). A limitation on religious exercise is justified only if the state can demonstrate that its compelling interest in public health, welfare, morality, or other secular values justifies the restriction, and that less restrictive means to achieve the state's secular ends are not available. *See Sherbert v. Verner, supra,* 374 U.S. at 406; *see also* L. Tribe, *American Constitutional Law* § 14-10 (1978). Reconciliation of these conflicting individual and state interests is accomplished only through an arduous balancing effort, one in which courts reluctantly engage.

In *Wisconsin v. Yoder, supra,* the Supreme Court found the criminal sanctions contained in a state compulsory education statute requiring attendance through age sixteen to violate the free exercise rights of Amish parents and their children. The Amish faith, the Court found, requires its members to lead a simple life, and to minimize contact with world influences by discontinuing formal schooling after the eighth grade. Chief Justice Burger, writing for the Court, found the practice "fundamental" and "mandated by the Amish religion." 406 U.S. at 216, 217. The state's interest in the education of its citizens, admittedly significant, was therefore not sufficiently compelling to force the Amish to send their children to school beyond the eighth grade.

Similarly, in *Sherbert v. Verner, supra,* the Court found the observance of the Sabbath to be a "cardinal principle" for Seventh Day Adventists, 374 U.S. at 406. While the state's goal of preventing the raising of spurious

unemployment claims and the subsequent dilution of state assistance funds was important, it did not justify forcing a Seventh Day Adventist to choose between following fundamental religious beliefs and eschewing benefits to which she was otherwise entitled. The state's failure to show that less restrictive practices would not have furthered its interest in preventing fraudulent claims supported the finding of a free exercise violation.[8]

*B.*

We find that the free exercise rights of the "Students for Voluntary Prayer" were not limited by the Guilderland School District's refusal to permit communal prayer meetings to occur on school premises. The students assert in their complaint that "God has directed them to join together with one another and pray to him as a group whenever possible and that such communal

---

[8] In several additional landmark free exercise cases the individual religious interests of Jehovah's Witnesses in peddling their religious literature, *e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and of members of the American Native Church in using peyote for religious ceremonies, *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal.Rptr. 69 (1964), outweighed state interests advanced for the regulation of those activities through licensing and the imposition of criminal sanctions, respectively. But the public interest in the health and well-being of minors justified a statutory ban on the public sale of religious periodicals by minor members of the Jehovah's Witnesses, *Prince v. Massachusetts*, 321 U.S. 158 (1944). The desirability of creating a uniform day of rest was accepted by the Supreme Court in *Braunfeld v. Brown*, 366 U.S. 599 (1961), which held that an Orthodox Jewish merchant had no right to an exemption to Pennsylvania's Sunday closing law. For a discussion of how *Braunfeld* has survived the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), see Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1400-03 (1967). Finally, the state's interest in maintaining public morality, difficult at best to define clearly, served as the basis for refusing to grant the Mormons an exemption from federal laws prohibiting bigamy. *Reynolds v. United States*, 98 U.S. 145 (1878).

prayer is particularly rewarding and effective. . . ." We do not challenge the students' claim that group prayer is essential to their religious beliefs. The effect of the school's actions, however—denying the students the opportunity to pray together in a classroom at the commencement of a school day—is hardly analogous to the coercive restraints on religious observation imposed by state action in *Sherbert* or *Yoder.*

The dilemma presented to individuals in *Sherbert* and *Yoder* was absolute. Individuals were forced to choose between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits. The choice for the students in this case is much less difficult because the school's rule does not place an absolute ban on communal prayer, nor are sanctions faced or benefits forfeited. While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place. *Stein v. Oshinsky,* 348 F.2d 999, 1001 (2d Cir.), *cert. denied,* 382 U.S. 957 (1965), *citing School District of Abington Township v. Schempp, supra,* 374 U.S. at 299 (Brennan, J., concurring). Several courts have noted that denial of the use of school facilities to students who wish to conduct voluntary prayer meetings during the school day does not violate the Free Exercise Clause. *Hunt v. Board of Education,* 321 F. Supp. 1263 (S.D. W.Va. 1971); *Trietley v. Board of Education, supra; Johnson v. Huntington Beach Union High School District,* 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (Ct. App.), *cert. denied,* 434 U.S. 877 (1977). *Contra, Reed v. Van Hoven,* 237 F. Supp. 48 (W.D. Mich. 1965). We do not have before us the case of a Moslem who must prostrate

himself five times daily in the direction of Mecca, or children whose beliefs require prayer before lunch, sports or other school activities. *Stein v. Oshinsky, supra,* 348 F.2d at 1001-02. If faced with these religious demands from students, a school board might have to make additional accommodations to permit the students to withdraw momentarily from the class. *See Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952). We have not been convinced, however, that the religious needs of the "Students for Voluntary Prayer" require such accommodation.

Several cases have noted that the free exercise rationale set forth above does require the state to permit prayer in certain special circumstances. But, none of them is applicable here. Authorization for prayer at public universities, for example, has been required because students both study and reside there. Frequently they are unable to hold prayer meetings off campus. *Chess v. Widmar,* No. 80-1048 (8th Cir. Sept. 19, 1980), *petition for cert. filed,* No. 80-689, 49 U.S.L.W. 3353 (Nov. 11, 1980); *Keegan v. University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976). Similarly, because the isolated member of the armed forces or the prison inmate may have no access to the regular religious facilities of the community, free exercise freedoms would be jeopardized if religious activity on a military base or in a prison were not authorized. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 296-99 (Brennan, J., concurring). Here, however, the students have made no showing that they lack other facilities for communal prayer.

*C.*

Even if we were to accept the students' contention that the School Board's refusal to allow school prayer signifi-

cantly encumbered their free exercise rights, a "compelling state interest" against the prayer meetings was present. *Sherbert v. Verner, supra.* The School Board asserted as an affirmative defense below, and argues as a compelling state interest here, that an authorization of student-initiated voluntary prayer would have violated the Establishment Clause by creating an unconstitutional link between church and state. We agree.

A state statute or regulation does not contravene the Establishment Clause if (1) the enactment has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. *Regan, supra,* 444 U.S. at 653; *Lemon v. Kurtzman, supra,* 403 U.S. at 612-13.

A neutral policy granting all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities. *Chess v. Widmar, supra,* slip op. at 15; *Johnson v. Huntington Beach Union High School District, supra.* The second, or "effects," test is more difficult to apply, for its standards are uncertain; determination of the "principal" or "primary" effects of a state action, *Regan, supra,* or even the supposedly more refined "direct and immediate effect" standard, *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 783 n.39 (1973), is, as one commentator notes, a "metaphysical distinction." Tribe, *supra,* § 14-9 at 840. The underlying question, however, is relatively straightforward: does a particular policy which is neutrally applied to religious organizations merely accommodate religious interests, or does it advance those nonsecular interests impermissibly?

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. *See Roemer v. Board of Public Works, supra,* 426 U.S. at 750, 764 (1976); *Abington, supra; Engel, supra; Chess v. Widmar, supra,* slip op. at 22-23; Tribe, *supra* § 14-5 at 825. An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school. *O'Hair v. Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979) (Leventhal, J.). Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, "Tis Education forms the common mind, / Just as the twig is bent, the tree's inclin'd." (Epistle to Lord Cobham).

*Abington* and *Engel,* for example, involved teacher supervision of the reading of verses from the Bible and the recital of a prayer composed by the State Board of Regents. Although students were permitted to be excused from the classroom during the prayer, the Supreme Court found that a particular form of Western theistic religion was improperly advanced by it. Similarly, when teachers from religious organizations are permitted to enter a public school for the purpose of religious instruction, the symbolism is apparent. *McCollum, supra.* Religious interests are permissibly accommodated, and not advanced, however, where a public school allows its students to leave

the premises for religious instruction under a "released time" program. *Zorach, supra.* Further, the semblance of official support is less evident where a school building is used at night as a temporary facility by religious organizations, under a program that grants access to all charitable groups. *Resnick v. East Brunswick Township Board of Education,* 77 N.J. 88, 389 A.2d 944 (1978). Also, where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created. *Wood v. Mt. Lebanon Township School District,* 342 F. Supp. 1293 (W.D. Pa. 1972).

The degree of official support of religious activities is greater, of course, in the school prayer or religious instruction cases than in the instant case. The record indicates that school buses discharge students at the Guilderland High School between 7:20 a.m. and 7:40 a.m., and that the official school day "begins" at this point. Any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal "homeroom" period at 7:50 a.m., therefore, would occur during school hours. The prayer meetings would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated.

The final element of the test is the prohibition of "entanglement," and the School Board has demonstrated that an excessive involvement of the state in religious matters would have resulted if the students' requests were granted. Entanglement analysis focuses on procedural questions, *Roemer v. Board of Public Works, supra,* 426 U.S. at 755, and, if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined. This frequently occurs where categorical grants to private schools are

distributed, since constant surveillance by the state is necessary to guarantee that no funds are used for religious purposes. *See, e.g., Nyquist, supra; Lemon, supra.* Excessive entanglement is undesirable because it involves state scrutiny of religious activities, a task necessarily requiring oversight of "core matters of belief and ritual." Tribe, *supra* § 14-12 at 870. This involvement threatens the voluntarism of religious observance and violates the principle of separation.

School officials in this case would be forced to monitor the activities of the "Students for Voluntary Prayer." The School Board has a duty under New York law to provide adequate supervision of all students in its "care and charge" during school hours. *Lauricella v. Board of Education*, 52 A.D.2d 710, 711, 381 N.Y.S.2d 566, 568 (4th Dep't 1976). Since the voluntary prayer meetings, to be conducted after the arrival of school buses, would, as we have said, occur during school hours, official supervision is required by law to ensure the smooth functioning of the school's secular schedule and the maintenance of the school's safety and order. More importantly, surveillance will be required to guarantee that participation in the prayer meetings would always remain voluntary.[9]

---

9 In *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965), the court authorized a school to permit student-initiated voluntary prayer at the commencement of the school day. Teacher supervision was permitted to maintain order at the prayer sessions. The court suggested that no bell signifying the start of the prayer exercise would be rung and that there should be a general commingling of the entire student body on the way to class.

While the outcome of the case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969, *Walz v. Tax Commission, supra*, 397 U.S. at 674, seriously undercuts the holding. The faculty supervision authorized by the court's decision is indicative of continuing surveillance of the students' prayer sessions that would have been necessary to assure that no coercion resulted.

Finally, we note that the state's compelling Establishment Clause interest in removing from the school any indication of sponsoring religious activity leads to the inescapable conclusion that no alternative accommodations were possible. *See, e.g., Engel v. Vitale, supra.*

IV.

This leaves for our disposition the students' claim that the School Board's refusal violates their rights to free speech, freedom of association, and equal protection. The students' argument, in short, is that they merely seek to exercise their rights to free speech in a public forum, unencumbered by governmental regulation of the context of their "speech." They state that, in general, students retain their fundamental constitutional right to free speech while attending school, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), and that restraints on religious speech in a public forum are impermissible. *Fowler v. Rhode Island,* 345 U.S. 67 (1953). Moreover, they argue that the School Board's denial of their request, in light of the ability of other student organizations to use school facilities, infringes their Fourteenth Amendment right to equal protection.

Two significant factors, however, defeat the claims. First, a high school is not a "public forum" where religious views can be freely aired. The expression of religious points of view, and even the performance of religious rituals, is permissible in parks and streets when subject to reasonable time, place, and manner regulations. *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Kunz v. New York,* 340 U.S. 290 (1951); *O'Hair v. Andrus, supra.* The facilities of a university have also been identi-

fied as a "public forum," where religious speech and association cannot be prohibited. *Chess v. Widmar, supra,* slip op. at 18-20; *Keegan v. University of Delaware, supra.* A high school classroom, however, is different, *Chess v. Widmar, supra,* slip op. at 22-23. While students have First Amendment rights to political speech in public schools, *Tinker, supra,* sensitive Establishment Clause considerations limit their right to air religious doctrines. Equally compelling, the students in this case propose to conduct *prayer* meetings in the high school, not merely discussions about religious matters. When the explicit Establishment Clause proscription against prayer in the public schools is considered, *School District of Abington Township v. Schempp, supra; Engel, supra,* the protections of political and religious speech, *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972); *Saia v. New York,* 334 U.S. 558 (1948), are inapposite. *See Chess v. Widmar, supra* (Bright and McMillian, JJ., dissenting from denial of rehearing en banc). In short, these two vital distinctions indicate that the students' free speech and associational rights, cognizable in a "public forum," are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context.

Also, the students' equal protection argument is not persuasive. Other organizations are permitted to utilize school facilities, but their use does not raise serious problems of the establishment of religion. Moreover, since all religious groups are equally denied access to school facilities, any equal protection argument lacks merit. *See Trietley, supra,* 409 N.Y.S.2d at 917.

V.

Although we affirm the dismissal of the students' complaint, we cannot be critical of their objectives. Introspective activity that seeks to strengthen the moral fibre of our nation's young adults deserves our support, but only in our role as private citizens. We hope that the "Students for Voluntary Prayer" can conduct their prayer meetings and religious discussions at another place and at different times. To permit these activities to occur in the classrooms of a public high school immediately prior to the commencement of the school day, however, would contribute to the erosion of principles articulated by our colonial fathers and embraced by religious dissenters for several hundred years. To paraphrase Lord Melbourne, while the state cannot be regarded as a pillar of the edifice of religion, it may be considered a buttress, supporting free exercise from the outside. We must be careful that our public schools, where fundamental values are imparted to our children, are not perceived as institutions that encourage the adoption of any sect or religious ideology.



600—11-19-80 • USCA—5009—A

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 243-5775

Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1396

In The

# Supreme Court of the United States

OCTOBER TERM, 1980

JEANNE BRANDON, et. al.,

*Petitioners,*

*— v. —*

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, et. al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE RESPONDENTS

CONRAD THEODORE CARLSON, III
*Attorney of Record for Respondents*
Tabner, Carlson, Daffner and Farrell
90 State Street
Albany, New York 12207
(518) 436-7643

## TABLE OF CONTENTS


Page

Table of Cases ..... i

Summary of Argument ..... 1

Argument ..... 2

Petitioners' Authorities Distinguished ..... 13

Conclusion ..... 18


### Table of Cases:


*Abington School District* v. *Schempp*, 374 U.S. 203 (1963) ..... 2, 3, 6, 7, 10, 12

*Chamberlin* v. *Dade County Board of Public Instruction*, 374 U.S. 487 (1963) 377 U.S. 402 (1964) ..... 2

*Commissioner of Education* v. *School Committee of Leyden*, 267 N.E. 2d 226, at page 228 (1971) cert denied 404 U.S. 849 (1971) ..... 6, 9, 13

*Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) ..... 12, 14

*Decker* v. *Dundee Central School District*, 4 NY 2d 462 (1958) ..... 14

*Despain* v. *DeKalb County Community School District*, 384 F 2d 836 (Seventh Circuit) cert denied, 390 U.S. 906 (1968) ..... 2, 8

*Engel* v. *Vitale*, 370 U.S. 421 (1962) ..... 2, 3, 6, 10, 12

*Everson* v. *Board of Education*, 330 U.S. 1 (1947) ..... 3, 5

*Garber* v. *Central School District No. 1*, 251 App.Div. 214 (Third Department, 1937) ..... 15

*Garvin* v. *Rosenau*, 455 F2d 333 (Sixth Circuit, 1972) ... 16

*Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) ..... 15

*Hunt* v. *Board of Education of County of Kanawha*, 321 F. Supp. 1263 (S.D. W. Va., 1971) ..... 7, 8, 13

Page

*ISKCON* v. *Wolke*, 453 F. Supp. 869 (E.D. Wisc., 1978) .. 17

*Johnson* v. *Huntington Beach U. High Sch. Dist.*, 137 Cal. Reptr. 43 (1977), cert denied 434 U.S. 877 (1977) ..... 10, 11, 13

*Keegan* v. *University of Delaware*, 349 A 2d 14 (1975), cert denied 424 U.S. 934 (1976) ..... 8, 9

*Kent* v. *Commissioner*, _____ Mass. _____, (No. 2087) 402 N.E. 2d 1340 (1980) ..... 6, 7, 9, 13

*Lauricella* v. *Board of Education*, 52 AD2d 710, Case No. 2 (App. Div. Fourth Department, 1976) ..... 14

*Lawrence Univ. Bicentennial Commission* v. *Appleton*, 409 F. Supp. 1319 (E.D. Wisc., 1976) ..... 16

*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) ..... 9, 12, 14

*Malnak* v. *Yogi*, 592 F2d 197 (Third Circuit, 1979) ..... 12

*Mangold* v. *Albert Gallatin A. Sch. Dist.*, 438 F 2d 1194 (Third Circuit, 1971) ..... 2, 7, 8

*McCollum* v. *Board of Education*, 333 U.S. 203 (1948) ..... 3, 4, 5, 10

*Meek* v. *Pittenger*, 421 U.S. 349 (1975) ..... 14

*Pell* v. *Procunier*, 417 U.S. 817 (1974) ..... 15

*People* v. *Johnson*, 6 NY 2d 549 (1959) ..... 15

*People* v. *Sprowal*, 49 Misc 2d 806 (1966) ..... 15

*Reed* v. *Van Hoven*, 237 F Supp 48 (W.D. Mich. S.D., 1965) ..... 10, 13, 14

*Resnick* v. *East Brunswick Township Board of Education*, 77 N.J. 88, 389 A 2d 944 (1978) ..... 17

*Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 49 L Ed 2d 179 (1976) ..... 8

*Sloan* v. *Lemon*, 413 U.S. 825 (1973) ..... 14

*Stacy* v. *Williams*, 306 F. Supp. 963, (N.D. Miss., 1969) .. 16

Page

*State Board of Education* v. *Board of Education of Netcong*, 57 N.J. 172, cert denied 401 U.S. 1013 (1971) ..... 6, 8, 13

*Stein* v. *Oshinsky*, 348 F 2d 999 (Second Circuit) cert denied, 382 U.S. 957 (1965) ..... 2, 5, 6, 8, 9

*Stone* v. *Graham*, _____ U.S. _____, 66 L Ed 2d 199 (1980) ..... 11

*Trietley* v. *Board of Education of the City of Buffalo*, 65 AD 2d 1 (Fourth Department, 1978) ..... 11, 13

*Vincent (Chess)* v. *Widmar*, _____ F 2d _____, (Eighth Circuit, 1980) reversing 480 F Supp. 907 (W.D. Missouri 1979) Cert granted Feb. 23, 1981 ..... 9

*Williams* v. *Board of Trustees*, 204 App.Div. 566 (Fourth Department, 1923) tried a second time and reported 210 App. Div. 161 (Fourth Department, 1924) ..... 15

*Wolman* v. *Walter*, 433 U.S. 229 (1977) ..... 14

*Zorach* v. *Clauson*, 343 U.S. 306 (1952) ..... 5, 10

No. 80-1396

In The

# Supreme Court of the United States

OCTOBER TERM, 1980

JEANNE BRANDON, et. al.,

*Petitioners,*

— *v.* —

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, et. al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE RESPONDENTS

### SUMMARY OF ARGUMENT

The decision below is in accordance with law as enunciated by this Court and by the Courts of the several Circuits. There does not appear to be a question of law which justifies the grant of a writ of certiorari in this matter.

Petitioner seeks to have the case reviewed upon the basis that the decision below conflicts with Establishment Clause principles articulated by this Court and other lower courts and upon the further basis that the decision below subordinates

settled principles of freedom of speech, freedom of association, freedom of religion, and equal protection to an erroneous construction of the Establishment Clause.

The respondents believe that the decision below is in keeping with the earlier decisions of this Court and of substantially all other courts which have been presented with similar issues over the past thirty years. It is respondents' contention that it would be constitutionally impermissible for the school district to grant permission to use a classroom for purposes as requested by the student petitioners.

## ARGUMENT

There can be no doubt that the proposed actions of the students would be religious in nature. A reading of the complaint shows clearly the intention and desire of these students to carry out a religious activity. The proposed meetings are not for the purpose of *studying about* prayer or *studying about* religion, but rather to participate directly in prayers and religious activities.

Were the school district to direct or require such activity, there could be little doubt that the action of the school district would be in violation of the Constitution. This has been so stated many times. *Engel* v. *Vitale*, 370 U.S. 421, (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Chamberlin* v. *Dade County Board of Public Instruction*, 374 U.S. 487 (1963) and 377 U.S. 402 (1964); *Despain* v. *DeKalb County Community School District*, 384 F 2d 836 (Seventh Circuit) cert denied, 390 U.S. 906 (1968); *Stein* v. *Oshinsky*, 348 F 2d 999 (Second Circuit) cert denied, 382 U.S. 957 (1965). *Mangold* v. *Albert Gallatin A. Sch. Dist.*, 438 F 2d 1194 (Third Circuit, 1971).

Petitioners seek to avoid the prohibition of *Schempp* and *Engel* upon the basis that the action of the pupils is voluntary. The United States Supreme Court addressed the issue of voluntariness in both cases. In *Schempp* it was stated:

> "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale*, supra (370 US at 430). Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon became a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson*, supra (330 US at 65)." *Abington School District* v. *Schempp*, supra, at pages 224 and 225.

Also in *Engel*, the court stated:

> "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitation of the Establishment Clause . . . The Establishment Clause, unlike the Free Exercise Clause does not depend upon any showing of direct governmental compulsion and it is violated by the enactment of laws which establish an official religion *whether those laws operate directly* to coerce nonobserving individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, supra, at pages 430 and 431. (emphasis supplied).

The concurring opinion of Mr. Justice Douglas quotes at length from the dissent of Mr. Justice Rutledge in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). This quotation includes references to Jefferson and Madison and states in part:

> "The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state." *Engel* v. *Vitale*, supra, at page 444.

Although the court in *Engel* does not rely upon the decision in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), that case also bears upon the issues here. There the attendance upon religious classes conducted in the public schools was voluntary,

although records of attendance were kept. Mr. Justice Black delivering the opinion of the court found that there was tax supported property used for religious instruction and that the operation of the state's compulsory education system assisted the program of religious instruction. In the concluding paragraph of his opinion, Mr. Justice Black stated:

> "Here not only are the state's tax supported school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery. This is not separation of Church and State." *McCollum* v. *Board of Education*, supra, at page 212. (emphasis supplied)

The concurring opinion of Mr. Justice Frankfurter points out the pressures brought upon the child to attend the voluntary release time program and the consequences of such pressures.

> "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

> "As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages" *McCollum* v. *Board of Education*, supra, at pages 227 and 228.

Mr. Justice Jackson, who dissented in *Everson*, wrote a separate concurring opinion in *McCollum* in which he stated that the court "can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the school . . ." (page 235).

Although the court in *Everson* v. *Board of Education*, supra, found that providing for transportation to public and parochial schools was acceptable upon a pupil benefit theory, the court did make the often repeated pronouncement that is also applicable here:

> "Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for Church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education*, supra, at pages 15 and 16.

Petitioners in the instant proceeding seek something other than that which was authorized in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). There the court upheld the New York release time program. One distinction demonstrated by the court was that in *Zorach* the students left the school buildings and school grounds and all costs were paid by the religious organization. The court points out that in *McCollum* public school classrooms were used for religious instruction, as they would be in the present instance.

In 1965 certiorari was denied in *Stein* v. *Oshinsky*, supra, which had similar facts to those in the case presently at issue. Shortly after that decision, the same issue was raised in the Commonwealth of Massachusetts. The Commissioner of Education brought a proceeding to enjoin the school committee

of Leyden from putting into effect a resolution making time available for free exercise of religion prior to the beginning of school. The highest court of the Commonwealth of Massachusetts determined that the voluntary religious exercises held on school property at the start of the school day with the permission of the school committee were prohibited, although there was no requirement for student or teacher participation. The court cited the *Stein* case and then stated that the broad language of *Schempp* has not been limited by the United States Supreme Court. The court then stated the law as we believe it should be stated here:

> "We think that, under the applicable First Amendment decisions, neither students nor teachers may be allowed to participate in the well-intended observances on school property authorized by the Leyden resolution." *Commissioner of Education* v. *School Committee of Leyden*, 267 NE 2d 226, at page 228 (1971) Cert denied 404 U.S. 849 (1971).

In March of last year the Supreme Judicial Court of Massachusetts considered the constitutionality of the following legislative enactment:

> "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during any such period an excusal provision will be allowed for those students who do not wish to participate." (Statutes 1979 see 692).

The highest court of Massachusetts ruled in *Kent* v. *Commissioner*, _____ Mass. _____ (No. 2087) 402 N.E. 2d 1340 (1980) that a statute requiring that there be a period of prayer with participation by volunteers was not permissible. The court cited not only *Leyden* but also *Schempp*, *Engel*, and *State Board of Education* v. *Board of Education of Netcong*, 57 N.J. 172, cert denied 401 U.S. 1013 (1971).

In its opinion that court also addressed the issue of Free Exercise of religion. The court stated in part:

> "There are parents, argued the defendant, for whom religion is so far a necessary constituent of their daily lives that they find it hard to abide a school day for their children in which a religious impulse is not in some way given voice; and there may be children who themselves have the same intense diurnal religious need and involvement. It was suggested that to invalidate § 1A was to prohibit to such votaries the Free Exercise of religion (see note 4). The constitutional answer is that it is not unreasonable to ask those parents and children to find accommodation for their religious practices outside the classrooms of public schools, for example, in the home." *Kent* v. *Commissioner*, _____ Mass. _____ 402 N.E. 2d 1340 at page 1345 (1980).

On the Question of voluntariness, the court stated:

> "And, as has been repeatedly observed, the supposed is hardly a robust or realistic conception when the choice is made by impressionable youngsters inclined to conformity, or by parents fearful of the phychological effects on their children of requiring them to claim release from the morning prayer. See Brennan, J., concurring, in *Schempp*, 374 U.S. at 287-294." *Kent* v. *Commissioner*, _____ Mass. _____ 406 N.E. 2d 1340 at page 1345 (1980).

A similar result was reached in *Hunt* v. *Board of Education of County of Kanawha*, 321 F.Supp 1263 (S.D. W.Va., 1971). In *Hunt*, the court held that the school board had the right to prohibit the use of school facilities for all religious activities and the prohibition did not deny the pupils the right of freedom of speech, freedom of assembly or free exercise of their religious beliefs.

Also the Third Circuit Court of Appeals has ruled:

> "Neither the fact that participation by students in the program is 'voluntary', nor the fact that the program may be denominationally neutral, is of constitutional moment when the establishment clause is involved." *Mangold* v. *Albert Gallatin A. Sch. Dist.*, supra, at page 1195.

This case involved daily bible reading and non-denominational prayers by volunteer students.

The Supreme Court of the State of New Jersey in a decision which this Court refused to review, has held that it is unconstitutional for students to voluntarily join in religious exercise prior to the formal opening of school. A student volunteer would read from the "remarks" of the Chaplain taken from the Congressional Record. *State Board of Education* v. *Board of Education of Netcong*, 57 N.J. 172 (1970) cert denied 401 U.S. 1013 (1971).

Petitioners cite among their authorities *Keegan* v. *University of Delaware*, 349 A 2d 14 (1975) cert denied 424 U.S. 934 (1976). The highest court of the State of Delaware considered the *Stein* case and stated that it did not think that the decision in that case dictated a different result in *Keegan* indicating that in *Stein* impressionable children were involved. In *Keegan* the court also referred to *Hunt*. The court in *Keegan* found a difference in both *Hunt* and *Stein* from the situation in the case before it which involved university students living in a dormitory. The court stated:

> "The *Hunt* case, while lacking the coercive situation found in *Stein*, still involved commuting high school students meeting voluntarily in classrooms or other premises of a high school. Neither case involved activity by adult residents of a living complex in common areas generally set aside for the benefit of such residents." *Keegan* v. *University of Delaware*, supra, at page 18.

This Court also recognized the effect of the age of the student in *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 49 L Ed 2d 179 (1976) when in referring to the Lemon I it stated "the elementary and secondary schooling in Lemon I came at an impressionable age". (p. 764)

It appears that the Second Circuit in *Stein* previously and now in the instant case ruled that the activities sought by petitioner herein are constitutionally impermissible. The Third Circuit in *Mangold* and the Seventh Circuit in *Despain* ruled similar activities impermissible. The State of New Jersey in 1970 in *Netcong* and the Commonwealth of Massachusetts in

1971 in *Leyden* and in 1980 in *Kent* determined that such activity is impermissible. This Court declined to review those of the decisions brought to it. In 1975, the highest court of the State of Delaware (*Keegan*) acknowledged that there was a distinction between those cases involving grade school or high school pupils who commute to school and university students who reside on campus in living quarters set aside for their use.

Recently this Court has granted certiorari in *Vincent (Chess)* v. *Widmar*, _____ F 2d _____ (Eighth Circuit, 1980) (cert granted Feb. 23, 1981). In that action the court granted to college students the right to conduct religious services in the buildings of a tax supported state university. The court, however, acknowledged and distinguished the case at bar stating that with high school students there was a greater risk of entanglement of governmental authority in religious issues. Secondly, the court stated that university students relied on the college campus as their total community and therefore could expect a greater accommodation than could high school students.

That a distinction exists between those instances arising in the public school system and other areas where the First Amendment rights of religious freedom are concerned is acknowledged by Laurence H. Tribe in his publication cited by petitioners. This comprehensive text on constitutional law points out quite clearly in Chapter 14 that there is a "special place of public schools in American Life" and as Professor Tribe has stated "no major religious activity, however 'voluntary', has been allowed to take place" in the public schools.

Subsequent to *Stein*, *Leyden* and *Keegan* the issue of the right of a Bible class composed of high school students to meet and conduct religious activities was addressed by the courts of California. School officials rejected the request of the students. The court discussed *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and the tripartite test of that case. In finding that the school officials acted properly in rejecting the students' request, the court stated:

> "It is also apparent that if the club is permitted to meet and conduct its activities on the school campus as a student club as demanded by plaintiffs, state financial support would flow directly to the club. It would be entitled to use classroom space rent free, receive heat and light and would be monitored by a paid faculty sponsor. The district would also be obligated at its expense to audit club finances. One of the factors differentiating McCollum from Zorach was the free use of school facilities, classrooms, heat and light. (Zorach v. Clauson, supra, 343 U.S. 306, 308-309, 72 S.Ct. 679, 96 L.Ed. 954). Thus this financial subsidy alone may be sufficient to compel constitutional condemnation of the requested state action.
>
> We do not rest our decision, however, on financial aid alone. The 'primary effect' test bespeaks not only of financial assistance but also necessarily inquired whether the consequence of state action is to place its imprimatur upon the religious activity. (Abington School District v. Schempp, supra, 374 U.S. 203, 216-219, 221-222, 83 S.Ct. 1560, 10 L.Ed.2d 844; Engel v. Vitale, supra, 370 U.S. 421, 430-436, 82 S.Ct. 1261, 8 L.Ed.2d 601. See also: Reed v. Van Hoven, supra, 237 F.Supp. 48, 51-53.) This aspect of the effect test reaches the essence of the Establishment Clause proscription."

and also:

> "The point is that impermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets." *Johnson* v. *Huntington Beach U. High Sch. Dist.*, 137 Cal. Reptr 43 (1977), cert denied, 434 U.S. 877 (1977), at pages 49 and 50.

The court then considered the issues of excessive state entanglement and the potential for divisiveness. On these issues the court stated:

> "Students who are members of less orthodox religions may be unable to organize a club because of insufficient student support or unavailability of a faculty sponsor. In such event, the free exercise rights of the minority might well be infringed by the pressure upon them to conform to the beliefs of the recognized religious club. Even if we assume that the spectrum of religious beliefs present in the national community is represented at the school, there is a real possibility that competing sects or beliefs will vie

> for school permission to operate on campus. Manifestly this could engender student divisiveness in matters of religious beliefs."

and also:

> "The school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization. This, the First Amendment will not permit." *Johnson* v. *Huntington Beach U. High Sch. Dist.*, supra, at pages 50 and 51.

The most recent decision of this Court on the issue of school and religious entanglement is *Stone* v. *Graham*, _____ U.S. _____, 66 L Ed 2d 199 (1980). This Court held that there was no secular purpose in posting the Ten Commandments in the classroom and that such posting serves no educational function. The Court then stated:

> "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone* v. *Graham*, supra, 66 L Ed 2 199, at page 202.

Recently the Courts of New York State have ruled on issues almost identical to those in the case presently under consideration. In *Trietley* v. *Board of Education of the City of Buffalo*, 65 AD 2d 1, (Fourth Dept., 1978) high school students sought permission from the Board of Education to form Bible clubs at three public high schools. The Superintendent of Schools and the Board of Education denied the request of the students. An Article 78 Proceeding to review the determination followed. In a unanimous decision the Appellate Division ruled that under the Education Law of the State of New York the Board of Education had *no authority* to grant the students' request. (Although a notice of appeal was filed, the Court of Appeals of the

State of New York has advised that the appeal was never perfected and has been dismissed).

The court found that even if the Board of Education had the authority to grant the students' request, that the Board of Education need not do so. The court then found that the proposed activities would violate the Establishment Clause of the First Amendment. Finally the court rejected the students' claim that their "First Amendment right of free exercise of their religion and freedom of expression and association" had been infringed upon.

In *Malnak* v. *Yogi*, 592 F2d 197 (Third Circuit, 1979), the Circuit Court of Appeals for the Third Circuit considered the teaching of a course called "Science of Creative Intelligence - Transcendental Meditation" in the New Jersey Public High Schools. The course was an elective at five high schools and was taught by teachers trained by the World Plan Executive Council - United States.

The Circuit Court found that the course was religious in nature and affirmed the decision of the District Court holding that the teaching of SCI/TM in public schools was prohibited. Citing *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), *Abington Township* v. *Schempp*, supra, and *Lemon* v. *Kurtzman*, supra, the Circuit Court held that this program provided for governmental aid to teach the course in question and the use of public school facilities which constituted excessive governmental entanglement with religion. Thus the court in *Malnak* v. *Yogi*, supra, denied the right of the school district to have religious activities in the public school.

In a concurring opinion Judge Adams observed that although there were "elements of involuntariness present in *Engel* and *Schempp*", that the SCI/TM courses were an elective and were entirely voluntary. This, however, was not sufficient to permit the courses to continue. The court concluded the concurring opinion by stating that the program was forbidden by the First Amendment.

## PETITIONERS' AUTHORITIES DISTINGUISHED

Petitioners have cited as authority for permitting the prayer meetings of the students the case of *Reed* v. *Van Hoven*, 237 F Supp 48 (W.D. Mich. S.D., 1965). This is the only case cited by plaintiffs where the factual situation resembles that of the case at bar.

In *Reed* plaintiffs brought an action claiming that the practices in the Jensen Public Schools violate both the Free Exercise and Establishment Clauses of the First Amendment. Plaintiffs sought an injunction to prevent the continuation of the practice of permitting meetings by pupils in the schools for the purpose of praying together. The defendants moved for summary judgment. The court denied the defendants' request for summary judgment and denied the plaintiffs' request for an injunction.

The court established an elaborate and complicated interim plan for the conduct of the meetings for prayer. This plan would of necessity involve a great deal of entanglement with the school program and would require the use of teachers for maintaining order. Included in the interim plan was a time schedule for the sounding of bells and an elaborate method for co-mingling of the student body so that no one would know who had congregated for the purpose of prayer. Counsel has been unable to trace this case past the interim decision of the District Court.

If we are to assume that this plan or policy of the District Court became the final action of the court and is currently being implemented, the result is certainly contrary to the rulings of the Second Circuit, the Third Circuit and the Seventh Circuit, the Supreme Court of Massachusetts in *Leyden* and *Kent*, the Courts of California in *Johnson* v. *Huntington Beach U. High Sch. Dist.*, supra, the Courts of New Jersey in *State Board of Education* v. *Board of Education of Netcong*, supra, the Courts of New York in *Trietley*, supra, and the District Court of the Southern District of West Virginia in *Hunt*. In fact *Reed* v. *Van Hoven*, supra, seems to stand alone.

The plan or policy that the court provided in *Reed* for would require a revision of the school procedures at Guilderland High School including at least a change in the bus schedules and the starting or ending time of classes. Transportation schedules and starting and ending times of classes of all schools in a central school district are all interrelated and are built around the need to transport pupils to the several widely separated schools of the district which vary in size and pupil population. A plan such as is set forth in *Reed* involves a high degree of entanglement and great involvement on the part of the administration and the entire student body and staff. Regulations and procedures would be required as to the opening of classrooms, the use of the rooms by pupils between the arrival of buses and the commencement of the homeroom period or classes, and the use of classrooms by the teachers. Pupil supervision would be required during this time span. Merely determining the proper place for the individual students would be a problem. They cannot be allowed to wander at will through the complex of buildings with over a hundred classrooms. Involvement of this magnitude by the administration, the teachers and hall monitors would be contrary to the holdings of the Supreme Court in *Lemon* v. *Kurtzman*, supra, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), *Sloan* v. *Lemon*, 413 U.S. 825 (1973), *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977) and other similar cases.

The school districts of the State of New York have an obligation to provide adequate supervision of the pupils during all of the time they are in school and from the time they are picked up in the morning by school buses until they are returned home after school hours.

*Decker* v. *Dundee Central School District*, 4 NY 2d 462 (1958).

*Lauricella* v. *Board of Education*, 52 AD2d 710 Case No. 2 (App. Div. Fourth Dept., 1976).

*Garber* v. *Central School District No. 1*, 251 App. Div. 214 (Third Dept., 1937).

*Williams* v. *Board of Trustees*, 210 App. Div. 161 (Fourth Dept., 1924).

*Williams* v. *Board of Trustees*, 204 App. Div. 566 (Fourth Dept., 1923).

Substantially all of the other cases cited by the petitioners relate to non-prayer situations or situations other than those in a public elementary or secondary school. Certainly the distribution of hand bills on public streets or religious ceremonies in public parks or on public streets or the right to pickett on public property are a far different situation from the conduct of prayer meetings in the public schools which have been prohibited.

There are many alternatives available to the pupils to carry out their desire to pray together and to express their religious beliefs. In discussing First Amendment rights, the Court has held in the past that regulation may be necessary to further significant governmental interest. *Pell* v. *Procunier*, 417 U.S. 817 (1974), *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972).

Unlike a public park or a public street, the public nature of our schools has been limited by the courts of this state. The Court of Appeals of the State of New York in construing a loitering statute stated:

> "A school is in a sense public in that it is endowed and operated by the taxpayers' money, but it is not public in the sense that any member of the public may use it for his own personal purposes, and is justifiably the proper subject for proscribed acts such as loitering. A school building being of such a restricted public nature, the attack upon section 722-b on constitutional grounds is wholly without merit." *People* v. *Johnson*, 6 NY 2d 549 (1959) at page 552.

In a concurring opinion, Chief Judge Conway distinguished between the public nature of railroad stations and the public nature of schools. A few years later a court again limited the public nature of a school. *People* v. *Sprowal*, 49 Misc 2d 806 (1966).

Petitioners cite *Stacy* v. *Williams*, 306 F. Supp. 963, (N.D. Miss. 1969) as authority for their contention that they have a right to pray in the classrooms of the Guilderland High School. Although in that action the three judge court invalidated the regulations promulgated by the Board of Trustees of Mississippi's Institutions of Higher Learning, the court stated:

> "There should be little question, if any, that a university is not constitutionally compelled to permit outside religious groups to conduct public worship services on the campus". *Stacy* v. *Williams*, supra, at page 975.

Nowhere in the regulations proposed by the court is there any reference to prayers, praying or religion. Rather the regulations in the Appendix were addressed to "Free discussion of subjects of either controversial or non-controversial nature". The petitioners here have not sought to discuss religion. They have requested "to use a classroom before school for communal Prayer" (paragraph 9 of complaint). Petitioners also state:

> "Because Plaintiffs attend school together and because they believe that communal prayer prior to the commencement of their daily work is a most important exercise of their religion, they seek a place at school at which they may hold their meeting." Paragraph 15 of complaint.

It appears that the desire of the petitioners is to have public worship service in the school, which is specifically prohibited by the court in *Stacy* v. *Williams*, supra.

*Lawrence Univ. Bicentennial Commission* v. *Appleton*, 409 F. Supp. 1319 (E.D. Wisc., 1976) is cited as authority for appellants' right to pray in the high school classrooms. In that case the court ruled that Angela Davis could speak in the school gymnasium. This was not a case involving religion or prayer, nor was the speaker to be present during the school day when pupils were present to attend classes.

Similarly, *Garvin* v. *Rosenau*, 455 F2d 333 (Sixth Circuit, 1972) cited by appellants is a free speech or controversial issue

case and not one involving the Establishment Clause of the First Amendment. The students desired to establish a chapter of the Student Mobilization Committee at Redford High School in Detroit. The group opposed United States intervention in South East Asia. In fact the Circuit Court only ruled that the federal issue was not insubstantial and stated specifically "We express no opinion on the merits of the case . . .".

In *ISKCON* v. *Wolke*, 453 F. Supp. 869 (E.D. Wisc., 1978) cited by petitioners, the religious group was allowed access to "those areas of the terminal building at General Mitchell Field which are generally open to the public". These areas constituted a "public forum". Contrary to petitioners' contention, a public high school is not generally open to the public and does not constitute a public forum. Certainly a public high school is not a public forum during the time that students have assembled to attend classes.

Petitioners cite as authority for their right to use a classroom for prayer purposes *Resnick* v. *East Brunswick Township Board of Education*, 77 N.J. 88, 389 A 2d 944 (1978). In that appeal it appeared that Baptist, Lutheran and Hebrew religious organizations rented space in public schools for the purpose of conducting religious services and religious schools. In each instance the religious group not only paid rent, but more important the activities were not conducted during the school day. The Court took particular note of this latter fact. This distinguishes the case from that at bar wherein the students seek to use the classrooms immediately prior to the first class after the students begin to arrive for the school day.

## CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter.

Respectfully submitted,

CONRAD THEODORE CARLSON, III
*Attorney of Record for Respondents*
Tabner, Carlson, Daffner and Farrell
90 State Street
Albany, New York 12207
Telephone: (518) 436-7643

Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
CLERK

# No. 80-1396

In the

# Supreme Court of the United States

**October Term, 1980**

Jeanne Brandon, et al., *Petitioners*

*v.*

The Board of Education of the Guilderland School District, et al., *Respondents*

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## Brief of the Center for Constitutional Studies of the University of Notre Dame Law School as Amicus Curiae in Support of the Granting of Certiorari

---

*Attorney for Amicus Curiae:*
**Edward McGlynn Gaffney, Jr.**
Associate Professor of Law
and Associate Director,
Center for Constitutional Studies
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2786

*Of Counsel:*
**Kenneth F. Ripple**
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2855

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS CURIAE ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 3

I. GRANTING CERTIORARI IN THIS CASE WOULD AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER ..... 3

II. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY ITS TEACHING CONCERNING THE PRIMACY OF THE FREE EXERCISE CLAUSE IN CASES OF CONFLICT WITH THE NO-ESTABLISHMENT PRINCIPLE AND CONCERNING THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER IMPORTANT VALUES PROTECTED BY THE FIRST AMENDMENT ..... 8

III. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY THAT THE HISTORIC PURPOSE OF THE FIRST AMENDMENT RELIGION CLAUSES WAS NOT TO STIFLE VOLUNTARY ASSOCIATION FOR THE PURPOSE OF ENGAGING IN RELIGIOUS ACTIVITIES, BUT TO KEEP THE GOVERNMENT FROM IMPOSING ANY SECTARIAN OR DENOMINATIONAL VIEWPOINT OR PRACTICE INVOLUNTARILY UPON THE PEOPLE ..... 15

CONCLUSION ..... 20
CERTIFICATE OF SERVICE ..... 21

## TABLE OF AUTHORITIES

Cases cited: Page(s)

Abington School District v. Schempp, 374 U.S. 203 (1963) ..... 4-5, 6, 16

Brandon v. Bd. of Education, 487 F. Supp. 1219 (N.D.N.Y.), aff'd., 635 F. 2d 971 (2d Cir. 1980) .... 3,9,10,11,16,19

Buckley v. Valeo, 424 U.S. 1 (1976) ..... 14

Chess v. Widmar, __ F. 2d __ (8th Cir. 1980), cert. granted sub nom. Widmar v. Vincent, No. 80-689 (1981) ..... 10

Committee for Pub. Ed. & Rel. Liberty v. Regan, 444 U.S. 646 (1980) ..... 3-4

Engel v. Vitale, 370 U.S. 421 (1962) ..... 4-5, 6

Everson v. Bd. of Education, 330 U.S. 1 (1947) ..... 8

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ..... 14-15

Fowler v. Rhode Island, 345 U.S. 67 (1953) .... 13

Gay Lib v. Univ. of Missouri, 558 F. 2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978) ..... 15

Healy v. James, 408 U.S. 169 (1972) ..... 15

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) ..... 15

Keegan v. Univ. of Delaware, 349 A. 2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976) ..... 10

Kunz v. New York, 334 U.S. 558 (1948) ..... 13
McCollum v. Bd. of Education,
333 U.S. 203 (1948) ..... 5,6
McDaniel v. Paty,
435 U.S. 618 (1978) ..... 12,13,15
NAACP v. Alabama, 357 U.S. 449 (1958) ..... 14
Niemotko v. Maryland, 340 U.S. 268 (1951) ... 13
Police Dept. of City of Chicago v. Mosely,
408 U.S. 92 (1972) ..... 13
Poulos v. New Hampshire,
345 U.S. 395 (1953) ..... 13
Sherbert v. Verner, 374 U.S. 398 (1963) ..... 8,9
Stein v. Oshinsky, 348 F. 2d 999 (2d Cir.),
cert. denied, 382 U.S. 957 (1965) ..... 11
Thomas v. Review Bd. of Indiana Employment
Security Div., 391 N.E. 2d 1127 (Ind. 1979),
cert. granted, No. 79-952,
444 U.S. 1070 (1980) ..... 9
Tinker v. Des Moines Indep. Community
School District, 393 U.S. 503 (1969) ..... 11-13
Tucker v. Texas, 326 U.S. 517 (1946) ..... 13
United States v. Seeger,
380 U.S. 163 (1965) ..... 12
United Transportation Union v. Michigan,
401 U.S. 576 (1971) ..... 14
Walz v. Tax Commission,
397 U.S. 664 (1970) ..... 7,9
Welsh v. United States,
398 U.S. 333 (1970) ..... 12
Wisconsin v. Yoder, 406 U.S. 205 (1972) ..... 8,9
Zorach v. Clauson, 343 U.S. 306 (1952) ..... 5,6

## INTEREST OF AMICUS CURIAE

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher education,[1] especially church-related colleges or universities.[2] In this capacity, this Center has come to acquire considerable experience with the interpretations by various federal officials of this Court's decisions concerning the Religion Clauses of the First Amendment. Like the judgment of the Court of Appeals in this case, these administrative judgments often go far beyond the holdings of this Court, and the amicus is in a position to suggest to this Court the impact that the decision of the Court of Appeals, if uncorrected by this Court, could have on religiously affiliated higher education. With the consent of the parties, this brief is filed to provide the Court with the views of amicus on the volatile issue of voluntary prayer in public schools, on the relationship between the two Religion Clauses of the First Amendment and between those clauses and other important values protected in the First Amendment, and on the historic purposes of the Religion Clause of the First Amendment.

---

[1]The Advisory Board of the Center for Constitutional Studies is composed of attorneys, college administrators and executives of denominations and religious bodies engaged in education. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups or communities of faith: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

[2]See e.g., P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education (1979)*.

## STATEMENT OF THE CASE

As the time of the commencement of this action the plaintiff-petitioners consisted of a group of six high school juniors (A5) who are currently of college age. At all times relevant to this lawsuit, the petitioners have sincerely believed that they should join together for daily communal prayer (A10-11, 24). Acting upon this religious conviction, they formed a voluntary association known as "Students for Voluntary Prayer" and sought permission from the defendant-respondents to use a room in their high school for the purpose of conducting communal prayer meeting before classes began; the meetings were to be held without any official school assistance, supervision, aid or participation (A8). Despite repeated assurances that these meetings were to be completely separate, distinct, and independent from all other school functions and activities, and that attendance at each meeting was entirely voluntary and at the sole discretion of interested individual students (A8), the principal of the high school, the superintendent of the school district, and the members of the school board all denied to "Students for Voluntary Prayer" permission to use any part of public school property for the purpose of joining together in speech or expression that has an explicitly religious content (A8-9). The reason proferred by the defendant-respondents for this action was that to allow any use of public school facilities for a religious purpose, such as the meetings contemplated by the petitioners, would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution (A10). The only legal authority for this view appearing in the record before the commencement of this action is an opinion letter dated October 9, 1978, and signed

by Robert D. Stone, General Counsel of the Commission of Education of the State of New York, who, without citing any case authority, expressed the view that "The United States Supreme Court has prohibited scripture reading and the recitation of prayers in the public schools, as violative of the establishment clause of the First Amendment of the United States Constitution and the doctrine of separation of church and state." (A42) Acknowledging that "The Supreme Court has not decided a case directly on point with this one," 487 F.Supp. 1219, 1222 (N.D.N.Y. 1980) and that he "was not comfortable with the result in this case, which will preclude a group of sincere young people from gathering together for religious purposes," *id.* at 1233, District Judge Neal McCurn granted summary judgment for the defendant-respondents and dismissed the complaint of the plaintiff-petitioners in its entirety. The Court of Appeals, in an opinion reported at 635 F.2d 971, affirmed the judgment of the District Court on November 17, 1980. Petitioners filed their petition for certiorari in timely fashion.

## ARGUMENT

### I. GRANTING CERTIORARI IN THIS CASE WOULD AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Educational Religious Liberty v. Regan*, 444 U.S. 646, (1980) Justice White wrote that "Establishment Clause cases are not easy; they stir

deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale*, 370 U.S. 421 (1962) and in *Abington School District v. Schempp*, 374 U.S. 203 (1963) have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[3] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[4] As a legitimate exercise of its obligation to promote willing acceptance of its decrees by the people, this Court should seize the opportunity afforded it by the instant case to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer in public buildings, including public school facilities.

---

[3]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of Engel and Schempp on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[4]For an account of the congressional reaction, see Beaney and Beiser, note 3 *supra*. And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same); Comment, "Section 1252: A Jurisdictional Dinosaur," 75 Northwestern U. L. Rev. 175, 176 (1980).

The opinion of the Court of Appeals in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings of those cases. This is not to suggest that this Court should reverse the decisions announced in those cases. For this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson*, 343 U.S. 306 (1952) and *McCollum v. Bd. of Education*, 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach*, *supra* at 315 (emphasis added). See, e.g., Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978). No such support was sought by the plaintiff-petitioners in this case. Ardent opponents of school prayer amendments have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer, testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish the reading of the Bible or recitation of prayers.

*Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

*Id.* at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that none of the activity that the petitioners sought to engage in was to be sponsored or provided for by the public school administration, this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

Such clarification is important not only for the ongoing relationship between this Court and other federal and state tribunals engaged in constitu-

tional adjudication. It would likewise be helpful for the myriad federal and state officials charged with executing a variety of programs of financial assistance. As was stated above, pg. 1, the work of the amicus is frequently focused on legal issues facing religiously affiliated colleges and universities, and in that way amicus has seen administrative interpretations of the constitution purporting to be grounded in this Court's decisions but ranging far beyond their holdings.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1979.[5] One of the results of this study is that the college administrators participating in the study rarely complained of federal regulation as excessively burdensome. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on campuses. By granting certiorari in this case, this Court could clarify for administrative officials that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

[5]The results of this study are to be published by the University of Notre Dame Press in the spring of 1981 under the title *The Government and the Campus: Federal Regulation of Religiously Affiliated Higher Education.* The page proofs of this study are available to the librarian of the Supreme Court, the parties in this litigation, and other amici upon request to the Center for Constitutional Studies.

## II. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY ITS TEACHING CONCERNING THE PRIMACY OF THE FREE EXERCISE CLAUSE IN CASES OF CONFLICT WITH THE NO-ESTABLISHMENT PRINCIPLE AND ITS TEACHING CONCERNING THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER IMPORTANT VALUES PROTECTED BY THE FIRST AMENDMENT.

### A. THE PRIMACY OF FREE EXERCISE OF RELIGION

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner*, 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson*, however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment

principle would always be the dominant concern.

Some courts, including the Court of Appeals in the instant case, apparently assume that reasonable accommodations of religious beliefs and practices constitute an impermissible establishment of religion. See, e.g. *Brandon*, 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division*, 391 N.E. 2d 1127 (Ind. 1979), cert. granted, No. 79-952, 444 U.S. 1070 (1980). But to indulge this assumption is to take an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, and to reduce the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). See also *Sherbert*, supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accomodation to individual belief"). To turn aside the free exercise claim presented by the petitioners on the basis of the conjecture or the worry that their praying together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert* and *Yoder*.

It must be stressed that the petitioners are not infants, but mature students, currently of college age, and all juniors in high school at the time of the commencement of this action.[6] The Court of

[6]This case is not moot if only because the issue of damages remains to be determined if this Court should reverse the decision of the Court of Appeals.

Appeals attempted to distinguish the instant case from the contrary holding in *Chess v. Widmar*, ___ F.2d ___, (8th Cir. 1980), cert. granted sub nom. *Widmar v. Vincent*, No. 80-689, 49 U.S.L.W. 3617 (1981), and in *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), on the ground that college freshmen should enjoy significantly greater First Amendment protection than should a high school senior. 635 F.2d at 977. This view is flawed for several reasons. First, the majority of our citizens complete their formal education and training in high school. Second, the process of maturation is developmental and does not occur magically upon the awarding of a high school diploma or upon matriculation in a postsecondary institution. One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that religious studies form an integral part of a liberal education.[7] If, as amicus maintains, college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, this policy cannot be fostered by stifling the development of

---

[7]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

religious sensitivities among students immediately before they go to college. Hence, if a court tolls the bell for the right of voluntary religious expression on behalf of high school seniors, amicus perceives it as tolling as well for the same freedom that should be enjoyed by college freshmen. For this reason, amicus believes that the reliance by the Court of Appeals, 635 F.2d at 977, on cases involving kindergarten students, *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965), is wholly misplaced. The student petitioners in the instant case are of sufficient maturity to register to vote, and, if it were necessary, to serve in the armed forces. It is a gross misunderstanding of the level of their maturity to treat them in a paternalistic fashion as though they were infants incapable of any intelligent, truly voluntary decision-making.

The Court of Appeals appears prepared to acknowledge at least implicitly a distinction between kindergarten children and upper level high school students. For in ruling on the free speech claims presented by the petitioners, it discussed the leading decision of this Court concerning the First Amendment rights of high school students, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1959). See 635 F.2d at 980. But the Court of Appeals misconstrued *Tinker* to be limited to *political* speech, asserting that "sensitive Establishment Clause considerations limit their right to air *religious* doctrines." 635 F.2d at 980 (emphasis supplied). *Tinker* may not be read in such a strained, wooden fashion, for although the wearing of a black armband by John Tinker and his companions in the context of a protest to this country's participation in the Vietnam conflict had clear overtones of political protest, the record in *Tinker* makes clear that the meaning of this act as

well as its motivation was explicitly religious.[8] Nothing in *Tinker* justifies the decision of the Court of Appeals that the government must allow on public school property sundry forms of political speech, but may ban from public property voluntary meetings of mature students for purposes of engaging in speech the content of which is religious. For "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By granting certiorari in this case, this Court could reaffirm its teaching concerning the primacy of free exercise values in cases of potential conflict with the no-establishment principle.[9] And

---

[8]The father of John Tinker is a Methodist minister who was at the time of the act challenged in the lawsuit working for the American Friends Service Committee, an organization founded by Quakers to oppose war and to help solve social problems in a friendly spirit. A. Ginger, *The Law, the Supreme Court and the People's Rights* 200 (1973). The wearing of the armband, coupled with voluntary fasting on two days during the Advent and Christmas season, was a religious act of mourning for the war dead. Even if the acts engaged in by the students had not been so explicitly linked to a traditional religion, these acts were surely within the expansive definition of religion adopted by this Court in the draft cases arising in this period, *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163, 187 (1965).

[9]See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).

this Court could likewise reassert that high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra*, at 506.

### B. THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER FREEDOMS PROTECTED BY THE FIRST AMENDMENT

Not only is the result reached by the circuit court not required by *Tinker;* it militates against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972). See also *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 334 U.S. 558 (1948), and *Tucker v. Texas*, 326 U.S. 517 (1946). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law*, 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). When, as here, a public school district makes its facilities available to a wide variety of groups wishing to use them for their meetings during off-school hours, A.15-18, but denies such access only to a voluntary association wishing to use the facility to engage in religious speech, the government has created a content-based restraint which unduly burdens the expression and communication of ideas. See L.

Tribe, *American Constitutional Law* 580-582 (1978).

The Court of Appeals did not address the claim of the petitioners that the action of the school board had denigrated their freedom of association. The desire to gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed. 1945).[10]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, it would not constitute a leap from from this Court's precedents to grant to mature students under the circumstances of the instant case the kind of constitutional protection afforded to civil rights groups, *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958), political parties, *Buckley v. Valeo*, 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan*, 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston*

---

[10]See Raggi, "An Independent Right to Freedom of Association," 12 Harv Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

*v. Bellotti*, 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). To fail to extend to the student petitioners in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James*, 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978), would be doubly ironic in that Students for Voluntary Prayer at no time sought official recognition, approval, or support for their activities. The associational rights of the petitioners should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring); and among these rights should be equal access to public facilities on a neutral and nondiscriminatory basis.

By granting certiorari in this case, the Court could reassert its teaching that a state may not unduly burden the free speech rights and the associational rights of high school students merely because the content of their speech and the purpose of their voluntary association is religious in character.

## III. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY THAT THE HISTORIC PURPOSE OF THE FIRST AMENDMENT RELIGION CLAUSES WAS NOT TO STIFLE VOLUNTARY ASSOCIATION FOR THE PURPOSE OF ENGAGING IN RELIGIOUS ACTIVITIES, BUT TO KEEP THE GOVERNMENT FROM IMPOSING ANY

## SECTARIAN OR DENOMINATIONAL VIEWPOINT OR PRACTICE INVOLUNTARILY UPON THE PEOPLE.

Whether this Court should engage in the writing of legal history in its opinions is itself a debatable matter.[11] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp*, 374 U.S. at 234 (Brennan, J., concurring). That this view does not preclude the writing of legal history by this Court follows from its occurence after one of Justice Brennan's own attempts to account for the history underlying the Religion Clauses. To adopt the view as a standard would imply one of two courses. Judges reviewing Establishment Clause matters should either be aware of the complexity of the historical aims of the Founding Fathers or they might prefer to resolve a case not by reference to history but by an analysis of the "concrete problems" before them. But it is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete problem. The opinion of the Court of Appeals adopts the oversimplified view that there were simply three different reasons for erecting a high and impregnable wall of separation of church and state. A more serious attempt to account for the history underlying the Religion Clauses than that produced by the Court of Appeals would, in fact, undergird a conclusion opposite from that reached by the Court of Appeals. Its simplistic version of the past should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or

[11] See, e.g., C. Miller, *The Supreme Court and the Uses of History* (1969), and literature cited therein.

for denigrating a free exercise claim because of a highly dubious conjecture that accommodation of that interest would impermissibly establish a religion.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those espoused by the Court of Appeals. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be

established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the petitioners. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their legitimate purposes. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In

this view, the Religion Clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964). If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by the Court of Appeals.

By granting certiorari in this case, the Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue in this case, and this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
Associate Professor of Law
and Associate Director
Center for Constitutional Studies
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2786

Of Counsel:

KENNETH F. RIPPLE
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2855

## CERTIFICATE OF SERVICE

State of Indiana )
) ss.:
St. Joseph County )

On this _____ day of March, 1981, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Brief of the Center for Constitutional Studies of the University of Notre Dame Law School as Amicus Curiae in Support of the Granting of Certiorari to the following attorneys:

Robert A. Destro, Esquire
General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233

C. Theodore Carlson, Esquire
Tabner, Carlson, Daffner & Farrell
90 State Street
Albany, New York 12207

---

EDWARD MCGLYNN GAFFNEY, JR.

Sworn to and Subscribed before me
the day and year aforesaid.

---

Rosemary K. Reiter, Notary Public

Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

**80-1396**

**No.**

IN THE

# Supreme Court of the United States

October Term, 1980

JEANNE BRANDON, et al.,

*Petitioners,*

*v.*

THE BOARD OF EDUCATION OF THE GUILDERLAND SCHOOL DISTRICT, et al.

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

THOMAS STEPHEN NEUBERGER
SHELDON N. SANDLER
BADER, DORSEY & KRESHTOOL
1102 West Street
P. O. Box 2202
Wilmington, Delaware 19899
(302) 656-9850

*Attorneys for Amicus Curiae*

CENTER FOR LAW AND RELIGIOUS FREEDOM
OF THE CHRISTIAN LEGAL SOCIETY
P. O. Box 2069
Oak Park, Illinois 60303
(312) 848-7735

*Of Counsel*

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CITATIONS | ii |
| INTEREST OF AMICUS CURIAE | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 3 |
| Plaintiffs Have Been Denied Equal Protection of the Law | 3 |
| A. The Defendants' Actions Intrude Upon a Fundamental Right Thus Making It Appropriate to Apply Strict Equal Protection Analysis | 3 |
| B. There Is No Compelling Reason for the School District to Withhold Its Consent to the Use of a Room for Voluntary Prayer Before the Beginning of the School Day | 6 |
| C. The Principle of Accommodating Neutrality Would Be Furthered by Allowing These Students to Have Access to a Room Under These Particular Circumstances | 10 |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 16 |

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Bogen v. Doty, 598 F. 2d 1110 (8th Cir. 1979) | 7 |
| Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) | 3 |
| Craig v. Boren, 429 U. S. 190 (1976) | 4 |
| Eisenstadt v. Baird, 405 U. S. 438 (1972) | 3 |
| Engle v. Vitale, 370 U. S. 421 (1962) | 6 |
| Graham v. Richardson, 403 U. S. 365 (1971) | 4 |
| Grossberg v. Deusebio, 380 F. Supp. 285 (E. D. Va. 1974) | 6 |
| Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948) | 6, 7 |
| Johnson v. Robison, 415 U. S. 361 (1974) | 4 |
| Keegan v. University of Delaware, 349 A. 2d 14 (Del. 1975), cert. denied 424 U. S. 934 (1976) | 9 |
| Kotch v. Board of River Port Pilot Commissioners, 330 U. S. 552 (1947) | 3 |
| Lawrence v. Buchmueller, 243 N. Y. S. 2d 87 (1963) | 8 |
| Levy v. Louisiana, 391 U. S. 68 (1968) | 3 |
| Lewis v. Califano, 616 F. 2d 73 (3d Cir. 1980) | 9 |
| Lincoln v. Page, 241 A. 2d 799 (N. H. 1968) | 7 |
| Marsh v. Alabama, 326 U. S. 501 (1946) | 9 |
| McDaniel v. Paty, 435 U. S. 618 (1978) | 4, 5, 10 |
| McGowan v. Maryland, 366 U. S. 420 (1961) | 3 |
| McLaughlin v. Florida, 379 U. S. 184 (1964) | 3 |
| Moore v. Board of Education, 212 N. E. 2d 833 (Ohio 1965) | 8 |
| NAACP v. Alabama, 357 U. S. 449 (1958) | 13 |
| Reed v. Reed, 404 U. S. 71 (1971) | 3, 4 |
| Reed v. Van Hoven, 237 F. Supp. 48 (W. D. Mich. 1965) | 8, 10 |
| Roemer v. Board of Public Works, 426 U. S. 736 (1976) | 11 |
| School District of Abington Township v. Schempp, 374 U. S. 203 (1963) | 6, 7, 10 |
| Shapiro v. Thompson, 394 U. S. 618 (1969) | 3 |
| Sherbert v. Verner, 374 U. S. 398 (1963) | 5, 11 |

## TABLE OF AUTHORITIES (Continued)

**Cases (Continued):** Page


Skinner v. Oklahoma, 316 U. S. 535 (1942) ..... 3
Stacy v. Williams, 306 F. Supp. 963 (W. D. Miss. 1969) ... 5
Stone v. Graham, — U. S. —, 101 S. Ct. 192 (1980) ..... 6
United States Department of Agriculture v. Moreno, 413 U. S. 528 (1973) ..... 3
Valent v. N. J. State Bd. of Ed., 274 A. 2d 832 (N. J. Super. 1971) ..... 12
Walz v. Tax Commission, 397 U. S. 664 (1970) ..... 10
Wiest v. Mt. Lebanon School District, 320 A. 2d 362 (Pa. 1974) ..... 6
Wisconsin v. Yoder, 406 U. S. 205 (1972) .....5, 11, 12
Wood v. Mt. Lebanon School District, 342 F. Supp. 1293 (W. D. Pa. 1972) ..... 6, 8
Zorach v. Clauson, 343 U. S. 306 (1952) .....7, 10, 12, 13, 14


**Constitutions:**


Constitution of the United States:
First Amendment .....*passim*
Fourteenth Amendment .....*passim*


**Miscellaneous:**


Kurland, P., "The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses," 75 W. Va. L. Rev. 213 (1973) ..... 11
Note, "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065 (1969) ..... 4
Pfeffer, L., "The Supremacy of Free Exercise," 61 Geo. L. J. 1115 (1973) ..... 11
The Holy Bible (King James) ..... 9
Toms, R. and J. Whitehead, "The Religious Student in Public Education: Resolving A Constitutional Dilemma," 27 Emory L. J. 3 (1978) ..... 8
Tribe, L., American Constitutional Law (1978) .....5, 11, 12

## BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

### INTEREST OF AMICUS CURIAE [1]

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students. Today it includes over 2500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith which is guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center has participated as amicus curiae in numerous legal and administrative proceedings. Its resources include, for example, prominent constitutional attorneys and an overview of national trends. In pursuit of its goals, the Center also has held numerous regional or national conferences providing continuing legal education by experts in fields which impact upon religious freedom. The Center's national membership and professional resources thus enable it to focus attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized. This brief is filed to provide the Court with the views of amicus on aspects of the Equal Protection and Religion Clauses which amicus believes have not been adequately addressed to date.

1. The letters of consent of the parties to the filing of this brief are being filed with the Clerk pursuant to Rule 36.1.

## STATEMENT OF THE CASE

In this case a group of high school students sought permission to use a room in their school in order to engage in voluntary communal morning prayer in compliance with fundamental and central religious beliefs (A50). These students are bused to school from various places around the school district and arrive at school between 7:20 and 7:40 a.m. The formal school day begins at 7:50 a.m. Their meetings were to be held without any official school assistance, supervision, aid or participation and with volunteer adult supervision. Permission to use a room was withheld by the school district despite the fact that other student organizations and the general public are permitted to utilize school facilities (A19, 50). Since these students are scattered around the school district and they must arise early in the morning to catch a bus to school (A55), there is no feasible alternative to holding a communal meeting anywhere other than at school. To do otherwise would require students to rise even earlier in the morning, to forsake transportation by school bus, to travel by some means to another location accessible to all the students, to pray communally and then to find some means of transportation to school.

## ARGUMENT

### Plaintiffs Have Been Denied Equal Protection of the Law.

### A. The Defendants' Actions Intrude Upon a Fundamental Right Thus Making It Appropriate to Apply Strict Equal Protection Analysis.

Plaintiffs have proven a violation of the Equal Protection Clause in this case. This Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment, as much as the Due Process Clause, protects individuals against arbitrary state action and forbids any classification which makes irrational distinctions between similarly situated persons or groups. *Eisenstadt v. Baird*, 405 U. S. 438, 446-47 (1972); *Reed v. Reed*, 404 U. S. 71, 75-76 (1971); *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552, 556 (1947). The Court has established two distinct standards for determining whether a statute or rule violates the Equal Protection Clause.[2] In cases involving routine social or economic regulations, a classification is deemed valid unless it is purely arbitrary or "wholly irrelevant to the achievement of the State's objectives." *McGowan v. Maryland*, 366 U. S. 420, 425 (1961); *United States Department of Agriculture v. Moreno*, 413 U. S. 528, 533 (1973). On the other hand, when the classification at issue is inherently "suspect" or when it affects "fundamental rights", the Court has applied a much stricter standard. In such cases, the Court has held that the classification, to be valid, must "promote a *compelling* governmental interest," *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969) (emphasis in original), or serve some "overriding" purpose. *McLaughlin v. Florida*, 379 U. S. 184, 192 (1964). *See also Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942) ("strict scrutiny" of sterilization law required); *Levy v. Louisiana*, 391 U. S. 68, 71 (1968) (Court is "extremely sensitive" to classifications which

2. The Equal Protection Clause, of course, applies to classifications created by governmental rule or policy as well as those created by statute. *See e.g., Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961).

affect "basic civil rights"); *Graham v. Richardson*, 403 U. S. 365, 372 (1971) ("heightened judicial solicitude" is required for certain classes of persons); Note, "Developments in the Law—Equal Protection", 82 *Harv. L. Rev.* 1065, 1076-1132 (1969).

Amicus curiae submits that the stricter standard of equal protection analysis is applicable in this case. The classification at issue here affects a "fundamental right", namely, the constitutional right of these students to freely exercise their religion. Their activity is being classified differently from other activities on campus solely because of the exercise of their religious obligations. Because the defendants' decision to refuse plaintiffs permission to use a room before school for voluntary prayer intrudes upon the plaintiffs' "fundamental rights", it is appropriate to apply the type of strict equal protection scrutiny that was set out by the Court in *Reed v. Reed*, *supra*, and *Craig v. Boren*, 429 U. S. 190, 197 (1976) (the classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives").

In *Johnson v. Robison*, 415 U. S. 361, 375 n. 14 (1974), this Court stated that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right." The Court did not apply a strict scrutiny test in that case only because it rejected the free exercise claim which was proffered. However, it is plain that the Court would have applied the stricter test if it regarded the free exercise claim as being valid. In this case, however, it is uncontroverted that "group prayer is essential to" the plaintiffs' religious beliefs (A12).

In *McDaniel v. Paty*, 435 U. S. 618 (1978), the subject involved herein was addressed by Mr. Justice Brennan in a concurring opinion joined by Mr. Justice Marshall. He stated:

> Whether or not the provision discriminates among religions . . . it establishes a religious classification—involvement in protected religious activity . . . which I believe is absolutely prohibited.

*Id.* at 631-32. Mr. Justice Brennan went on to note that the Tennessee state constitutional provision in question in *McDaniel*, which barred "[m]inister[s] of the Gospel or priest[s] of any denomination whatever" from serving in public office, "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 632. In discussing this case, Professor Tribe recently observed that "[b]ecause government may not constitutionally use religion as a basis for such burdensome classification, the law could not stand." L. Tribe, *American Constitutional Law*, 1979 Supplement, at pp. 78-79. Professor Tribe also pointed out that the plurality opinion of Chief Justice Burger required the State, in order to justify its attempted infringement on the appellant's religious activities, to prove "interests of the highest order." *Ibid.* at 79. *Compare, Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972) *and Sherbert v. Verner*, 374 U. S. 398, 406 (1963).

A three-judge federal District Court followed the same approach in *Stacy v. Williams*, 306 F. Supp. 963 (W. D. Miss. 1969). The Court there reviewed, among others, a rule providing that facilities of a University could not be made available for public religious meetings or gatherings to off-campus persons or groups of persons. The Court invalidated the regulation, holding

> [because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . .

*Id.* at 795. This case, too, illustrates that "religion" is not a reasonable classification and that a State may not choose the broad classification of "religion" for exclusion in its public educational institutions unless it can point to a compelling interest for doing so which cannot be achieved by other means.

**B. There Is No Compelling Reason for the School District to Withhold Its Consent to the Use of a Room for Voluntary Prayer Before the Beginning of the School Day.**

The school district attempts to justify its position by pointing to the First Amendment's Establishment Clause and contending that any hint of State sponsored establishment of religion is sufficient to prove a compelling interest. It claims that the very fact that a room in the school would be made available to students for the purpose of prayer would constitute State sponsorship.

In determining whether or not the State has shown a compelling interest, the Court must balance the State's interest against all other factors presented in support of the plaintiffs' interests. In assessing the competing interests, it would be well to review this Court's five opinions dealing directly with religious activities of public school pupils. In four of the five cases it was held that public schools cannot *sponsor* religious activities. But a review of the key facts in each case permits considerable insight into what this Court meant by the use of the word "sponsor".

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), *Engle v. Vitale*, 370 U. S. 421 (1962), *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), and *Stone v. Graham*, — U. S. —, 101 S. Ct. 192 (1980), the religious activities were (a) originated by the government and (b) curricular in nature. In each it appeared that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was sponsoring religion; and that is state action "respecting an establishment of religion" which is forbidden by the First Amendment.[3]

3. Non-curricular religious activity, in the form of religious invocations and benedictions at high school graduation ceremonies, has been approved by the courts. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E. D. Va. 1974); *Wood v. Mt. Lebanon School District*, 342 F. Supp. 1293 (W. D. Pa. 1972); *Wiest v. Mt. Lebanon School District*, 320 A. 2d 362 (Pa. 1974). Religious prayer among con-

But under many circumstances the state may "accommodate" an activity which it can not sponsor. This Court's fifth decision illustrates this principle. In *Zorach v. Clauson*, 343 U. S. 306 (1952), the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the school. This was held not to be an establishment of religion. The circumstance that *Zorach* approved off-campus activities similar to those which *McCollum* forbade on campus has given rise to the simplistic notion that the only operative facts under the establishment clause are the time and place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp, supra*, rejected this concept, pointing out, *id.* at 262, that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

*Id.* at 263. In a concurring opinion in *McCollum, supra*, at 230-31, four Justices foreshadowed this analysis and stated that the vice of the program was that "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

---

3. (Cont'd.)
senting adults to start public meetings also has been sustained. *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *Lincoln v. Page*, 241 A. 2d 799 (N. H. 1968).

The activity of the plaintiffs consequently should not be condemned simply because it is conducted on school property.[4] Their activity is neither originated by the government nor curricular. If accommodation of a truly voluntary religious activity is involved, religious activity can permissibly occur on school grounds. *See generally,* R. Toms and J. Whitehead, "The Religious Student In Public Education: Resolving A Constitutional Dilemma," 27 *Emory L. J.* 3 (1978). For example, in *Reed v. Van Hoven,* 237 F. Supp. 48, 53 (W. D. Mich. 1965), a District Court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87, 90-91 (1963), a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances which "[u]nlike *Engle* . . . or *Schempp* . . . which concerned active involvement by Government in religious exercises, . . . constitutes, at most, merely a passive accommodation of religion . . . ." Finally, in *Wood v. Mt. Lebanon Township School District,* 342 F. Supp. 1293, 1295 (W. D. Pa. 1972), a District Court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation."

From this analysis it can be concluded that it is permissible for the State to accommodate the religious interests of school pupils on school premises as long as their actions are voluntary and the State avoids the legal stigma of sponsorship. Needless to say, cases in this area are decided on the facts. In this case, it has been demon-

4. The fact that the physical place of the religious activity is not the controlling factor was confirmed in *Moore v. Board of Education,* 212 N. E. 2d 833 (Ohio 1965), where the court would not allow a released-time program off the school campus because the facts indicated that, in the eyes of the pupils, it appeared that the school was conducting the religious instruction.

strated that communal morning prayer is of fundamental and central importance to the plaintiffs in the practice of their religion (A50). The opinion of the Second Circuit expressly acknowledged the importance of the communal aspect of the plaintiffs' morning worship (A12). Moreover, *The Holy Bible* repeatedly stresses the great significance of and obligation to engage in morning prayer. *The Holy Bible* (King James): Psalm 55:17 ("Evening, and morning, and at noon, will I pray . . ."); *Psalm* 119:164 ("Seven times a day do I praise thee . . ."); *Psalm* 5:3; *Psalm* 59:16; *Psalm* 88:13; *Daniel* 6:10; 1 *Thessalonians* 5:17.

If one accepts, as the Court must, *Lewis v. Califano*, 616 F. 2d 73, 79-81 (3d Cir. 1980), the importance to plaintiffs of this religious activity, the next question is whether alternative means are available to plaintiffs. While the Second Circuit accepted the students' contention that "group prayer is essential to their religious beliefs" (A12), it then ignored the thrust of these facts, and concluded that the students will have to worship together in some other location before the school day (A20). But the facts show that this is simply not feasible. Just as in a company town, or on a university campus, *see Marsh v. Alabama*, 326 U. S. 501, 508 (1946); *Keegan v. University of Delaware*, 349 A. 2d 14, 18 (Del. 1975), *cert. denied*, 424 U. S. 934 (1976), the nature of the worship in which these plaintiffs desire to engage is simply foreclosed to them unless it takes place after the school bus arrives at school. They are foreclosed from practicing their religion at any other place with these fellow students because of the early hour at which they would otherwise have to arise and, even more importantly, because of transportation requirements.

It is also worth noting that while the Second Circuit characterized the arrival of the buses as the beginning of the school day, this is not entirely accurate. No formal school activities take place until 7:50, which is the official beginning of the school day. Thus, there would be no interference with any part of the formal school program

if plaintiffs' request were granted. *Cf. Reed v. Van Hoven, supra,* at 50, 54 (Voluntary prayer took place outside the hours of the regular school day).

Withholding of permission in these circumstances, therefore, burdens those with the strongest religious beliefs, those who feel compelled to engage in communal morning prayer. This case is no different than that of the minister prevented from running for office in Tennessee, who felt so strongly about his religion that he had become a minister and thereby placed himself within the coverage of the state constitutional provision, which prohibited his activity. *McDaniel v. Paty, supra.*

**C. The Principle of Accommodating Neutrality Would Be Furthered by Allowing These Students to Have Access to a Room Under These Particular Circumstances.**

In *School District of Abington Township v. Schempp, supra,* at 225, this Court stated that the government may not affirmatively oppose or show hostility to religion, thus preferring those who believe in no religion over those who believe in religion. Considering the purposes underlying the Religion Clauses, this Court has insisted upon governmental neutrality with respect to religion. In *Walz v. Tax Commission,* 397 U. S. 664, 676 (1970), it was stated:

> Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of *benevolent neutrality* toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

(emphasis added) *See id.* at 669. As long ago as *Zorach v. Clauson, supra,* at 314, Mr. Justice Douglas stated that government cannot be indifferent to the religious element of our society.

> That would be preferring those who believe in no religion over those who do believe. . . . But we find no

> constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

This Court recently addressed the issue again, in *Roemer v. Board of Public Works*, 426 U. S. 736 (1976). In upholding Maryland's provision of annual subsidies to eligible colleges and universities against a challenge of unconstitutionality under the Establishment Clause, the Court emphasized:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions and also as between religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*

*Id.* at 745-46. (emphasis added)

From such analyses the accommodating neutrality principle has developed under the Religion Clauses. Accommodating neutrality is the doctrine whereby this Court has protected Free Exercise claims from Establishment Clause challenges. Whenever the two clauses conflict Free Exercise claims must supercede Establishment Clause considerations. *See Sherbert v. Verner, supra,* at 409-10; *Wisconsin v. Yoder, supra,* at 234 n. 22. In any such conflict Free Exercise values must be preserved. P. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses," 75 *W. Va. L. Rev.* 213, 244 (1973); *see* L. Pfeffer, "The Supremacy of Free Exercise," 61 *Geo. L. J.* 1115, 1142 (1973). Professor Tribe has found that this conclusion accords with the intent of the framers of the Constitution. Tribe, *American Con-*

*stitutional Law*, at 819 (1978).[5] When the two Religion Clauses overlap, a zone of intersection is created. This Court's recognition that Free Exercise values must be paramount in such cases has been characterized by Professor Tribe as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." Tribe, *supra*, at 823. In his words, this is the "zone of permissible accommodation" of Establishment Clause concerns to Free Exercise values.

The principle of accommodating neutrality was well stated by Mr. Justice Douglas in *Zorach v. Clauson*, *supra*, at 313-14 (emphasis supplied).

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

*Accord, Wisconsin v. Yoder*, *supra*, at 234 n. 22; *see* 220-21.

In the instant case, the action of the school district is directly contrary to the principle of accommodating the religious beliefs of our citizens. Religious activity has been excluded solely because a room is needed and allowing the use of the room, according to the Second Circuit, "would indicate that the State has placed its imprimatur on a particular religious creed." (A15). This conclusion is logically insupportable. No endorsement of a student Ku Klux Klan or Nazi meeting would be read into a school district decision to make a room available to students for such a meeting (A50). Nor would the use of a room by an Atheists' Club, much less a French club, be construed as an endorsement of the aims of the group using the room. Simply because the group interested in using the room is one whose motivation is religious, rather than philosophi-

5. *Accord, Valent v. N. J. State Bd. of Ed.*, 274 A. 2d 832, 837 (N. J. Super. 1971).

cal or political, should not change the outcome. *NAACP v. Alabama*, 357 U. S. 449, 460-61 (1958).

The Second Circuit expressed concern about possible coercion of other students if school leaders attended voluntary prayer meetings. But surely the potential effect on other students is far greater where the captain of the football team and the student body president get out of their seats in the middle of the formal school day and depart for another locale under a "released time" program, such as the one approved by this Court in *Zorach v. Clauson*. Obviously, far greater pressure to conform is exerted in that situation, but it is not viewed by this Court as so coercive as to violate the Establishment Clause.

The Second Circuit also attempted to distinguish the case of the Muslim who must pray five times a day, or children whose beliefs require prayer before lunch, sports or other activities (A12-13). But this is precisely what has been proven by plaintiffs herein. Their religion requires communal morning prayer with their peers and they are being prevented from doing this. They are situated precisely like the Muslim who must pray five times a day or children whose beliefs require prayer at certain times. But the Court inexplicably ignored this identity.

In the instant case, denying the mere use of a room under circumstances where rooms are available to other groups manifests hostility toward religion, not neutrality. The defendants can avoid any hint of sponsorship of religion by simply issuing a uniform policy regarding the use of rooms before school, making rooms available for any lawful purpose on a first come—first served basis to interested students (A50). If, under such a policy, a group of student Nazis requested a room, and the district assured itself that the purpose was a peaceful one, not posing a threat of substantial disruption, consent could not be withheld. No rational person would contend that the school district was thereby endorsing Nazi activities. In like manner, endorsement of prayer would not be implied by

permitting the students to use a room for that purpose under an evenhanded policy. Any contrary suggestion runs headlong into *Zorach v. Clauson, supra,* which authorizes schools to release students in the middle of formal school activities for religious purposes.

Finally, it should be pointed out that the Second Circuit is inaccurate in stating (A16-17) that school supervision will be necessary. The District Court specifically pointed out, at 487 F. Supp. 1222, that the program would be staffed with volunteer parental supervisors. Even if this were not so, no extra burden would be placed on the school district in any event since the students have to be supervised anyway somewhere on school property after buses arrive. It is also respectfully submitted that the Second Circuit's gratuitous conclusion that it would be necessary to police the activity for voluntariness is a featherlike makeweight (A17). There is no hint in the actual record to suggest that the activity would be anything other than voluntary, nor is there any indication that the participating students or parents would attempt to dragoon other students into praying.

## CONCLUSION

In this case the Court below has tilted too far in the direction of avoiding Establishment Clause problems and in so doing has violated the Equal Protection and Free Exercise rights of the plaintiffs. A neutral policy regarding access to rooms before school would permit these plaintiffs to utilize a room for voluntary communal prayer in accord with the mandate of their religion, without doing violence to Establishment Clause rights. Accordingly, a writ of certiorari should issue.

Respectfully submitted,

THOMAS STEPHEN NEUBERGER
SHELDON N. SANDLER
BADER, DORSEY & KRESHTOOL
1102 West Street
P. O. Box 2202
Wilmington, Delaware 19899
(302) 656-9850
*Attorneys for Amicus Curiae*

CENTER FOR LAW AND RELIGIOUS FREEDOM
OF THE CHRISTIAN LEGAL SOCIETY
P. O. Box 2069
Oak Park, Illinois 60303
(312) 848-7735
*Of Counsel*

Dated: February 13, 1981

## CERTIFICATE OF SERVICE

STATE OF DELAWARE }
NEW CASTLE COUNTY } *ss.:*

BE IT REMEMBERED, on this day of February, A. D., 1981, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared, Thomas Stephen Neuberger, who being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the within Brief of the Center for Law and Religious Freedom of The Christian Legal Society as Amicus Curiae in Support of the Granting of Certiorari to the following attorneys:

Robert A. Destro, Esquire
General Counsel
Catholic League for Religious and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233

C. Theodore Carlson, Esquire
Tabner, Carlson, Daffner & Farrell
90 State Street
Albany, N. Y. 12207

THOMAS STEPHEN NEUBERGER

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

*Notary Public*

Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

# No. 80-1396

In the

# Supreme Court of the United States

## October Term, 1980

Jeanne Brandon, et al., *Petitioners.*

*v.*

The Board of Education of the Guilderland School District, et al., *Respondents*

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

**Brief of Certain Law Professors as Amici Curiae in Support of the Granting of Certiorari**

---

*Attorney for Amici Curiae:*
**Theodore F. Zimmer**
Adjunct Associate Professor of Law
Marquette University School of Law
780 N. Water
Milwaukee, Wisconsin 53202
(414) 277-5747

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

THE AMICI CURIAE.....1

INTEREST OF THE AMICI CURIAE.....5

STATEMENT OF THE CASE.....6

REASONS FOR GRANTING THE WRIT.....8

I. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS REJECTING CONTENT-BASED RESTRICTIONS ON THE RIGHT OF FREE SPEECH, THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED ON ITS MERITS.....8

*II. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS RECOGNIZING A STUDENT FORUM FOR POLITICAL EXPRESSION, THE COURT OF APPEALS SHOULD BE REVIEWED ON ITS MERITS..10*

*CONCLUSION.....16*

## TABLE OF AUTHORITIES

### CASES

*Chess v. Widmar,*
*--F.2d--, (8th Cir. 1980)*
*cert. granted sub nom. Widmar*
*v. Vincent, No. 80-689 (1981).....14-15*

*Cox v. Louisiana, 379 U.S. 536*
*(1965).....9,10*

*Food Employees v. Logan Valley*
*Plaza, 391 U.S. 308 (1969).....10*

*Goss v. Lopez, 419 U.S. 565*
*(1975).....13*

*Grayned v. City of Rockford,*
*408 U.S. 104 (1972).....9,14*

*Hague v. C.I.O., 307 U.S. 496*
*(1939).....10*

*Lemon v. Kurtzman,*
*403 U.S. 602 (1971).....9*

*Madison Joint School District*
*v. Wisconsin Employment*
*Relations Commission, 429 U.S.*
*167 (1976).....11*

*Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972).....8,11*

*Saia v. New York, 334 U.S. 558 (1948).....10*

*San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).....10*

*Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).....8*

*Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).....11,12*

*Wood v. Strickland, 408 U.S. 508 (1974).....14*

**MISCELLANEOUS**

*Note, Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents, 14 Harv. Civ. Rts-Civ. Lib. L. Rev. 485 (1979).....13*

*L. Tribe, American Constitutional Law (Foundation Press 1978).....12-13*

## THE AMICI CURIAE

Barbara Bader Aldave
Professor of Law
University of Texas
Law School
2500 Red River
Austin, Texas 78705

G. Sidney Buchanan
Professor of Law
University of Houston
Central Campus
Houston, Texas 77004

George Devlin
Professor of Law
Suffolk University Law School
11 Hilltop Road
Dover, Masschusetts 02030

John E. Dunsford
Professor of Law
St. Louis University School of Law
3642 Lindell Boulevard
St. Louis, Missouri 63108

Edward McGlynn Gaffney, Jr.
Associate Professor of Law
Notre Dame Law School
Notre Dame, Indiana 46556

Charles Kindregan
Professor of Law
Suffolk University Law School
41 Temple Street
Boston, Massachussets 02114

James M. McGoldrick
Associate Dean and Professor of Law
Pepperdine University School of Law
Pacific Coast Highway
Malibu, California 90265

John T. Noonan
Professor of Law
Boalt Hall School of Law
University of California
474 Boalt Hall
Berkeley, California 94720

Raphael J. Rabalais, Jr.
Associate Professor of Law
Loyola University School of Law
6333 Loyola Avenue
New Orleans, Louisiana 70118

Grover Rees
Assistant Professor of Law
University of Texas Law School
2500 Red River
Austin, Texas 78705

Peter W. Salsich, Jr.
Professor of Law
St. Louis University School of Law
3642 Lindell Boulevard
St. Louis, Missouri 63108

Basile J. Uddo
Associate Professor of Law
Loyola University School of Law
6333 Loyola Avenue
New Orleans, Louisiana 70118

Theodor F. Zimmer
Adjunct Associate Professor of Law
Marquette University School of Law
780 North Water Street
Milwaukee, Wisconsin 53202

## INTEREST OF AMICI CURIAE

The law professors who appear as *amici curiae* on this brief do so to urge this Court to accept *Brandon* v. *Board of Education of Guilderland School District* for review because of the impact of the lower court's decision on traditional constitutional doctrine governing the right of free speech. By virtue of their profession, these *amici* have a unique interest in the preservation of a free and varied exchange of ideas and a clear and consistent statement of the law.

## STATEMENT OF THE CASE

At the time this action was commenced, the petitioners were a group of high school students who sincerely believed that they should join together for daily communal prayer. In furtherance of their beliefs, they formed a voluntary organization known as the "Students for Voluntary Prayer" and sought permission from the respondents to use a room in their high school for their meetings. The meetings were to take place before the offical start of the school day and were to be held without any official school assistance, aid, supervision or participation. Despite repeated assurances that the meetings were to be completely separate from official school functions, that volunteer adults would be provided for purposes of supervision, if necessary, and that

attendance was entirely voluntary for any student who wished to attend, the respondents denied petitioners permission to use any part of the school property for their meetings. The reason given was that the use of public school property for the purposes contemplated by the petitioners would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution. United States District Judge Neal McCurn granted summary judgment for the respondents, 487 F.Supp. 1219 (N.D.N.Y. 1980), and the Court of Appeals affirmed on the grounds that the meetings would "create an improper appearance of official support ...." (Petitioners' Appendix at A-16).

## REASONS FOR GRANTING THE WRIT

The Court of Appeals decision in this case warrants review because of its impact on the doctrines of content-based restrictions and public forum which are applicable in free speech cases.

### I. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS REJECTING CONTENT-BASED RESTRICTIONS ON THE RIGHT OF FREE SPEECH, THE COURT OF APPEALS DECISION SHOULD BE REVIEWED ON ITS MERITS.

This Court has clearly and consistently rejected content-based restrictions on the right of free speech. The Court explained its position in its now classic statement in *Police Department of Chicago* v. *Mosly*, *408 U.S. 92 (1972)*:

"Once a forum is opened up to

> assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they say." *408 U.S. at 96.*

*See also, Cox* v. *Louisiana, 379 U.S. 536 (1965); Grayned* v. *Rockford, 408 U.S. 104 (1972).*

In this case, the issue of a content-based restriction *cannot* be resolved by the application of Establishment Clause analysis. Where the speaker is private and the message is religious, the tripartite test of *Lemon* v. *Kurtzman, 403 U.S. 602 (1971)* does not apply. Establishment Clause analysis is applicable only when the speaker is governmental. Here the speakers are clearly non-governmental; they are students. Indeed, the Court of Appeals was only able to perceive a "symbolic inference" of governmental involvement in religious activities. (App. A-15).

## II. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS RECOGNIZING A STUDENT FORUM FOR POLITICAL EXPRESSION, THE COURT OF APPEALS SHOULD BE REVIEWED ON ITS MERITS.

In the words of this Court, public fora are places such as "...streets, sidewalks, parks, and other similar places...so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees* v. *Logan Valley Plaza, 391 U.S. 308, 315 (1969)(reversed on other grounds); See also, Hague* v. *CIO, 307 U.S. 496 (1939); Shuttlesworth* v. *Birmingham, 394 U.S. 147 (1969); Saia* v. *New York City, 334 U.S. 558 (1948).*

The essence of the concept of a public forum is equal access. As Justice Hugo Black stated in concurrence in *Cox* v. *Louisiana, supra,* "...if the streets

of a town are open to some views, they must be open to all." *379 U.S. at 580. See also, City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).*

Courts will carefully scrutinze attempts to justify selective exclusions. *Police Department of Chicago* v. *Mosley, 408 U.S. at 98-99; See also, San Antonio School District* v. *Rodriguez, 411 U.S. 1, 16-17 (1973). Madison Joint School District* v. *Wisconsin Employment Relations Comm'n, supra.*

Although this Court has not squarely decided whether a public high school is or can be a public forum, it has decided that a public high school is an appropriate forum for political expression. *Tinker* v. *Des Moines School District, 393 U.S. 503 (1969).* In *Tinker*, the Court stated:

> "In our system, state-operated schools may not be enclaves of totalitarianism ...[Students] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be continued to the expression of those sentiments that are officially approved." 393 U.S. at 511.

Whether a public high school is an appropriate forum for expression other than political expression was left undecided by the Court.

Subsequent to the *Tinker* decision, writers have commented on the nature of the forum recognized in that case. Professor Laurence Tribe in his recent treatise on constitutional law stated:

> "Public facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression,

> have been treated as semi-public forums, with government enjoying power to preserve such tranquility as the facilities' central purpose requires -- a power that would be denied in a true public forum -- but no power to exclude peaceful speech or assembly compatible with that purpose." L. Tribe, American Constitutional Law, at 689-90.

Another writer labelled this type of student forum a "limited forum." Note, Challenging Ideological Exclusion of Curriculum Material: Right of Students and Parents, 14 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 485 (1979).

Adding to this lack of clarity as to the nature of the forum is a series of decisions by this Court recognizing other constitutional rights within the schoolhouse gate. *Goss* v. *Lopez* (*419 U.S. 565*

*(1975))*; *Wood v. Strickland*, *(408 U.S. 308 (1974))*. These cases raise even further questions as to which constitutional rights exist beyond the schoolhouse gate -- and the nature of those rights.

For example, this Court in *Grayned v. City of Rockford*, *supra*, as have other courts, federal and state, commented that "... *Tinker* made clear that school property may not be declared off limits for expressive activity by students...". In light of the decision below, your *amici* argue that *Tinker* did not make clear whether school officials may regulate, on the basis of content, what expressive activity is constitutionally permissible on school property.

Furthermore, the acceptance of *Chess v. Widmar*,- *F. 2d - (8th Cir. 1980)*,

*cert. granted sub nom. Widmar v. Vincent, No. 80-689 (1981)* for review and the rejection of *Guilderland* would leave unanswered the question raised in *Vincent* of whether the nature of the forum differs in the high school and college contexts.

## CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals in *Brandon* v. *Board of Education of the Guilderland School District.*

Respectfully submitted,

/s/ Theodore F. Zimmer
Theodore F. Zimmer
Adjunct Associate Professor of Law
Marquette University Law School
780 North Water Street
Milwaukee, WI. 53202
(414) 277-5747

*Counsel for Amici Curiae*

Office-Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80--1396

# In The Supreme Court of the United States

October Term, 1980

**JEANNE BRANDON, et al.,**

*Petitioners,*

*v.*

**THE BOARD OF EDUCATION OF THE GUILDERLAND SCHOOL DISTRICT, et al.**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE LEADERSHIP FOUNDATION AND THE KENTUCKY HERITAGE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

THEODORE HENRY AMSHOFF, JR.
AMSHOFF & AMSHOFF
3260 First National Tower
Louisville, Kentucky 40202
(502) 582-2419
*Attorney for Amici Curiae*

# TABLE OF CONTENTS

Page

TABLE OF CITATIONS ..... ii

INTEREST OF AMICUS CURIAE ..... 1 - 2

STATEMENT OF THE CASE ..... 3

ARGUMENT ..... 4 - 12

I. Granting Certiorari Will Result in A Clarification of the Degree of Accommodation Which Public Secondary Schools Must Afford Their Students in the Exercise of Religious Beliefs ..... 4 - 10

II. Granting Certiorari Will Present the Court An Opportunity to Consider Whether A Constitutionally Permissible Distinction May Be Made in A Public School Between Student Voluntary Political Speech and Voluntary Religious Speech, Resulting in Protection of the Former and the Burdening of the Latter .... 10 - 12

SUMMARY OF ARGUMENT ..... 13

CONCLUSION ..... 13

## *TABLE OF AUTHORITIES*

*Cases cited:* Page (s)

*Abington School District v. Schempp*, 374 U.S. 203 (1963) ... 9-10-11

*Brandon v. Board of Education*, 487 F. Supp. 1219 (N.D.N.Y. 1980); aff'd. 635 F. 2d 971 (2nd Cir., 1980) ..... *passim*

*Chess v. Widmar*, ____ F. 2d ____ (8th Cir., 1980), *cert. granted sub nom. Widmar v. Vincent*, No. 80-689 (1981) ..... 7

*Engle v. Vitale*, 370 U.S. 421 (1962) ..... 11

*Everson v. Board of Education*, 330 U.S. 1 (1947) ..... 9

*Fowler v. Rhode Island*, 345 U.S. 67 (1953) ..... 7

*Healey v. James*, 408 U.S. 169 (1972) ..... 10

*Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), *cert. denied* 424 U.S. 934 (1976) ..... 7

*McDaniel v. Paty*, 435 U.S. 618 (1978) ..... 8-9

*Meek v. Pittenger*, 421 U.S. 349 (1975) ..... 9

*Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) ..... 5

*Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92 (1972) ... ..... 12

*Sherbert v. Verner*, 374 U.S. 398 (1963) ..... 6-7-8

*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) ..... 5-10

*United States v. Seeger*, 380 U.S. 163 (1965) ..... 6-7

*Walz v. Tax Commission*, 397 U.S. 664 (1970) ..... 8-9-10

*Welsh v. United States*, 398 U.S. 333 (1970) ..... 9

*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) ..... 4-5

*Whitney v. California*, 274 U.S. 357 (1927) ..... 4

*Wisconsin v. Yoder*, 406 U.S. 205 (1972) ..... 6-7-8

*Zorach v. Clauson*, 343 U.S. 306 (1952) ..... 9

*United States Constitution:*

Amendment I ..... *passim*

Amendment XIV ..... *passim*

*Other Authorities:*

Garvey, "Children and the First Amendment", 57 Texas Law Review 321 (1979) .....

Kauper, *Religion and the Constitution* (1964) .....

Pfeffer, "The Supremacy of Free Exercise", 61 Georgetown L.J. 1115 (1973) .....

Tribe, *American Constitutional Law* (1978); 1979 Supplement .. .....

No. 80—1396

# In The Supreme Court of the United States

October Term, 1980

**JEANNE BRANDON, et al.,**

*Petitioners,*

*v.*

**THE BOARD OF EDUCATION OF THE GUILDERLAND SCHOOL DISTRICT, et al.**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE LEADERSHIP FOUNDATION AND THE KENTUCKY HERITAGE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

### INTERESTS OF THE AMICI CURIAE

The amicus Leadership Foundation, Inc., is a Washington-based foundation established in 1966 and involved in research and fact gathering for numerous family rights organizations throughout the nation, many of which have members similarly situated to the petitioners in this case. The Leadership Founda-

tion has undertaken substantial demographic research and studies for legislators and others concerning student rights of religious expression in public schools. The amicus Kentucky Heritage Foundation is a non-profit educational division of the National Heritage Foundation. In general, the Kentucky Heritage Foundation seeks to foster a public awareness of the influence of the Judeo-Christian tradition upon American life. In particular, it endeavors to promote sensitivity in academic environments towards religious expression and the protection of believers in the exercise of their religious and political rights.

The questions presented in this case are a matter of paramount importance to the purpose of the amici curiae foundations in their advocacy of rights of voluntary religious expression, freedom of association and freedom of speech for religious purposes in public school environments. This brief is filed to present the views of these amici on the preeminence of the Free Exercise Clause in First Amendment analysis, to direct this Court's attention to the prior restraint on voluntary student association and speech with religious content arising from the Court of Appeals' decision, and to suggest the opportunity which this case presents for this Court to clarify certain persistently problematic issues manifested nationally concerning the degree of protection and accommodation which public school officials must extend to the religious aspirations of their students.

## STATEMENT OF THE CASE

This action arises from a request by petitioners, a voluntary association of high school students, to use a classroom of the respondent, Guilderland School District for voluntary communal prayer before school was in session (A9-10). As a matter of religious conviction, petitioner students sincerely held it to be their obligation to engage in daily communal prayer (A50). such a gathering held off of school property was effectively precluded inasmuch as the students are required to attend school and all but one of the students were dependent on the bus transportation furnished by the respondent school board directly to and from the Guilderland High School (A11, 55). Petitioner students sought a vacant classroom to meet voluntarily for religious discussion, meditation, reflection and communal prayer without any official supervision, aid or participation by school officials. Said classroom was to be used prior to the commencement of homeroom at 7:50 a.m. and first class at 8:05 a.m. Volunteer adults would serve as monitors to assure order (A8, 49, 54-55).

Respondents regularly permitted usage of school facilities by other student and community groups for other non-academic activities; [*inter alia:* a dance company, theater group, soccer club, ski team, military recruiters, Rotary exchange, a square dance club, and the Helderberg Twirlers (A15-18, 50)].

Nonetheless, respondents denied permission to the petitioner high school students to use the requested vacant classroom, even prior to the commencement of school, for the purpose of communal prayer, voluntary speech and other activity. This denial apparently occured because of the students' religious purposes and the respondents' perception that such permission would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States (A10, 42).

The District Court granted summary judgment for the respondent school board [487 Fed. Supp. 1219 (N.D.N.Y. 1980)], and the Second Circuit affirmed (635 F. 2d 971). Petitioner students now timely seek a writ of certiorari from this Court.

## ARGUMENT

### I. GRANTING CERTIORARI WILL RESULT IN A CLARIFICATION OF THE DEGREE OF ACCOMMODATION WHICH PUBLIC SECONDARDY SCHOOLS MUST AFFORD THEIR STUDENTS IN THE EXERCISE OF RELIGIOUS BELIEFS.

Public schools hold a special place in American life. Within their walls the great majority of American children are educated for citizenship and prepared for the responsibilities of adult life.[1]

Because of their unique role as the place where inculcation of values to the young occurs, recognized by the Court of Appeals *ab initio* (635 F. 2d 971 at 973), particular judicial solicitude is necessary to avert damage to those very values which should most be exemplified.[2] As this Court observed in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 at 637 (1943):

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason

---

[1]In addition to class time, many public school students by necessity are compelled to remain at such schools long before and after actual school hours. For example, the record here discloses that the school buses arrived as early as 7:20 a.m., a half hour before the 7:50 a.m. homeroom. In the afternoon, school is dismissed at 2:45 p.m., but the last bus did not depart until 3 hours later, at 5:45 p.m. (A55).

[2]As Mr. Justice Brandeis noted, upholding values relating to personal liberty can be both an end and a means. See *Whitney v. California,* 274 U.S. 357, 375 (1927). Protection of First Amendment rights of a public school student is desirable not only because of the primary objective of preserving the student's right to freedom of choice against state encroachment, but also because such protection serves an instrumental puprose in the process of adolescent growth and development. See Garvey, "Children and the First Amendment," 57 Texas Law Review 321 (1979).

> for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

It is now beyond cavil that constitutional rights belong to minors not yet of age, as well as those who are. Justice Blackmun, speaking for the Court in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 at 74 (1976), reiterated this principle:

> Constitutional rights do not mature and come into being magically only when one attains the state - defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Neither can it be said with reference to a public secondary school that the mere locus of the exercise justifies a denial of a student's rights of freedom of speech or expression. In *Tinker v. Des Moines School Dist.*, 393 U.S. 503 at 506 (1969), this Court said:

> First Amendment rights, applied in line with the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Because the decision below concerning free exercise by public school students impacts upon the vehicle of society so instrumental in shaping future generations, clarification of the rights of such students in public school environments is of national importance. The issues of this case have implications for voluntary religious expression far beyond the confines of the Guilderland School District. The questions affect adolescent Americans in public high schools across the nation. Granting certiorari would afford this Court an opportunity to define the extent to which the "scrupulous protection" of *Barnette* must be accorded to public secondary school students in the free exercise of their religious beliefs.

An evaluation of the action of the respondent school board (denying students a place to meet for voluntary communal prayer prior to the commencement of school) in light of the five-part free exercise analysis arising from *United States v. Seeger*, 380 U.S. 163, 166 (1965), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discloses that the students admittedly satisfied the first two prongs of the test. Petitioner students allege, and respondent school board does not deny, that the practice of voluntary communal prayer is a religious belief of the students, and that such belief is truly held. (A50, 52; 635 F. 2d at 977).[1] Resolution of the free exercise issue thus depends upon the disputed third, fourth and fifth parts of the test, i.e., (3) whether student free exercise rights are in fact inhibited by the school board's action, (4) whether a compelling state interest exists to give occasion to permissible limitation of the students admitted free exercise claims, and (5) whether, even if such a compelling interest is found, an alternative less burdensome to the students' free exercise rights exists to satisy such an interest.

The Court of Appeals finds no state limitation of the students' rights under the third part of the above stated test because it perceived that the coercive restraint was not absolute (635 F. 2d at 977). However, there is no authority from this Court for such a premise that governmentally-imposed burdens on free exercise rights need be absolute to be constitutionally offensive.

Petitioner students were precluded from using a vacant classroom for voluntarily associating with each other for communal prayer and sharing of religious experience before school hours. Such restrictions on association for religious purposes, while perhaps theoretically not absolute, in fact constitute a significant restriction on religious expression, and directly impair the ability of the petitioners to meet together for such purpose at all. the functional impairment to the students' free exercise rights

---

[1]The students' view that communal prayer is a desirable and necessary form of religious expression has an understandable Biblical basis. See, e.g., "For where two or three are gathered together in my name, there am I in the midst of them" *Matthew* 18:20.

becomes even more significant a burden because all but one of the petitioner students were dependent on bus service provided by the school district for transportation to and from their homes.[4] For practical purposes, alternative opportunities to gather in similar fashion elsewhere outside school hours other than in the same building which concurrently serves as both educational facility and transportation center are virtually negated.[5]

The Court of Appeals reasoned that "we have not been convinced, however, that the religious needs of the 'Students for Voluntary Prayer' require such accommodation." In so doing, it comes dangerously close to departing from the boundary of judicial inquiry in free exercise analysis set forth by this Court in *Fowler v. Rhode Island*, 345, U.S. 67 at 69-70 (1953): "It is no business of courts to say that what is a religious practice or activity for one group is not religious under the First Amendment."

Subject to the requirements of *United States v. Seeger, supra.*, the centrality of the practice of voluntary daily communal prayer and Bible study to the student's religious beliefs is a matter of conscience for the students and not an invitation for independent conjectures by a court. Rather than weigh the free exercise claims of the petitioners against the claims of a hypothetical Moslem student's prostrations to Mecca or the conjectured needs of others whose beliefs require periodic prayer (635 F. 2d at 977), the relevant judicial inquiry under the *Sherbert/Yoder* analysis should have proceeded directly to consideration of whether some

---

[4]See footnote 1, *supra.*

[5]The Court of Appeals' distinguishment (635 F. 2d at 977) of *Chess v. Widmar*, _____ F. 2d _____ (8th Cir. 1980) *Cert. granted sub nom. Widmar v. Vincent*, No. 80-689 (1981); and *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934 (1976), appears to be based upon a dubious premise. High school students living in all corners of the school district and dependent on the bus service provided by the respondent school district have less, not more, freedom of movement and opportunity to gather together off-campus than do college students. Particularly is this so when, as here averred by the respondent school district's principal, "customarily all of the plaintiffs who were transported by school bus by the school district would leave the high school at the normal dismissal time of 2:45 p.m." (A55).

compelling state interest exists to give occasion for permissible limitation of the students' free exercise rights.

The Court of Appeals' concern to protect other students "in the 'captive audience' setting of a school" (635 F. 2d at 978) from peer pressure such as would create a *de facto* involuntary participation in free exercise activities prior to school hours does not constitute any such compelling state interest. In the first place, the gatherings in question occur before the student audience becomes "captive." Secondly, *direct* coercion by the state to prevent student use of otherwise unoccupied classrooms is by no means justified to prevent the indirect influence of students upon each other.

Certainly such total banning of student use of a vacant classroom before school is not the least burdensome alternative available to prevent such pressure. Indeed, the allocation of an otherwise vacant classroom prior to school to accomodate those students who wish to gather voluntarily for group prayer would seem to be less laden with the potential for such peer pressure than effectively consigning such groups to meet in whatever location at Guilderland High School other students informally gather to await the opening of school and the commencement of the homeroom period.

After assuming *arguendo* that the students' rights were significantly impaired, the Court of Appeals concluded that the Establishment Clause furnished the compelling state interest to give justifiable occasion for the limitations imposed on the students' free exercise rights. In so holding, the Court of Appeals in effect enshrined Establishment Clause responsibilities as dominant in conflict with the students' rights under the Free Exercise Clause. Such a premise is at odds with the trend of this Court's decisions and the views of many prominent constitutional scholars. See *Walz v. Texas Commission*, 397 U.S. 664 (1970); *Sherbert v. Verner, supra; Wisconsin v. Yoder, supra; McDaniel v. Paty*, 435 U.S. 618 (1978); Tribe *American Constitutional Law*, §14-7 (1978)[6]; Pfeffer, "The Supremacy of Free Exercise," 61 George-

[6]Professor Tribe concludes that "the free exercise principle should be dominant in any conflict with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." (Tribe, 833).

town L.J. 115 (1973).

The Establishment Clause, properly understood, should be viewed as a shield against governmental attempts to inhibit religion. It should not be construed as a sword by which the free exercise rights of the petitioners are to be impaled. See *McDaniel v. Paty, supra,* at 641 (Brennan, J., concurring). The discriminatory manner in which respondents have withheld permission otherwise granted student and non-student groups to use school facilities outside of school hours so as to preclude petitioners' use of said facilities solely because of their religious purposes is hardly the attitude of wholesome accommodation of conscience and non-hostile neutrality which the Free Exercise Clause and the Establishment Clause combine to foster. See *Zorach v. Clauson,* 342 U.S. 306, 313-314 (1952); *Everson v. Board of Education,* 330, U.S. 1, 16 (1947); *Abington School District v. Schempp,* 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Welsh v. United States,* 398 U.S. 333, 372-374 (1970) (White, J., joined by Burger, C.J., and Stewart, J., dissenting) ("... neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment."); *Meek v. Pittenger,* 421 U.S. 349, 386-387 (1975) (Burger, C.J., concurring in part and dissenting in part); *id* at 395-396 (Rehnquist, J., joined by White, J., dissenting) [citing P. Kauper, *Religion and the Constitution,* 79 (1964): "Any interpretation of (the Establishment Clause) and the constitutional values it serves must also take account of the free exercise clause and the values it serves."]

As Mr. Justice Douglas said for the Court in *Zorach,* there is no constitutional imperative "to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." 343 U.S. at 314.

Particularly in view of the discriminatory impact upon petitioner students of the respondents' refusal to make available to them the same facilities available to other groups, the analytic suggestions of Justice Harlan in his concurring opinion in *Walz v. Tax Commission, supra,* are particularly instructive:

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. 397 U.S. at 696.

Granting certiorari in this case would give the Court an opportunity to clarify the analytic considerations appropriate for lower courts to employ in the increasing amount of litigation wherein the protection of free exercise values create facial conflicts with apparent Establishment Clause considerations.

## II. GRANTING CERTIORARI WILL PRESENT THE COURT AN OPPORTUNITY TO CONSIDER WHETHER A CONSTITUTIONALLY PERMISSABLE DISTINCTION MAY BE MADE IN A PUBLIC SCHOOL BETWEEN STUDENT VOLUNTARY POLITICAL SPEECH AND VOLUNTARY RELIGIOUS SPEECH, RESULTING IN PROTECTION OF THE FORMER AND THE BURDENING OF THE LATTER.

The teaching of this Court indicates that public academic institutions are not enclaves immune from the First Amendment. Student claims to freedom of speech and association are constitutionally cognizable interests meriting judicial protection. *Tinker v. Des Moines Independent School Dist., supra; Healy v. James,* 408 U.S. 169, 180-185 (1972).

The Court of Appeals nonetheless concluded that petitioners do not fall within the purview of such protection, apparently premised upon a content-based distinction of the differing subject matter under discussion. ["A high school classroom, however, is different. While students have First Amendment rights to political speech in public schools, sensitive Establishment Clause considerations limit their right to air religious doctrines." (citations omitted), 635 F. 2d at 980].[7]

---

[7]The Court of Appeals apparently based these Establishment Clause consideration on a perceived "explicit Establishment Clause proscription against prayer in the public schools" arising from a flawed construal of *Abington*

An alternative interpretation of the Court of Appeals' rationale fails to avoid the slide down the slippery slope of association and speech restrictions based on content criteria. The decision below could alternatively be construed as justifying restrictions on student expression of religious ideas by coupling the initial categorization of speech content (i.e., "political" or "religious") with a further entangling scrutiny of religious speech based on its purpose and the identity of the speaker's intended listener. ["Equalling compelling, the students in this case propose to conduct *prayer* meetings in the high school, not merely discussions about religious matters." (emphasis by the Court of Appeals) 635 F.2d at 980].

Even voluntary speech about religious matters thus becomes dissectable according to its content and its intended listener. With regard to religious matters, purely academic commentary directed to other students is impliedly permissible. However, if the speech is directed toward the Deity instead of another student, and the speech is changed from public declaration to public supplication or thanksgiving, such speech becomes *verboten*, or at least not accomodable by school authorities.

Under such logic if the student crosses the threshold from assertions of fact to assertions of faith, his voluntary speech and association rights suddenly become suspect. Left unanswered but assumably equally suspect under the reasoning of the decision below are student acts of proselytization or evangelism on school property outside of school hours, since the Court of Appeals' implied that both "prayer" and the "right to air religious doctrines" were equally problematical (*id*).

Such content-based restrictions upon student speech in a forum made generally available to other groups is fraught with constitutional pitfalls, even if the Court of Appeals' reasoning were more

---

*School District v. Schempp, supra.*, and *Engle v. Vitale*, 370 U.S. 421 (1962), both of which cases involved *state-mandated religious exercises* by a captive student audience during school hours, not voluntary prayer by a voluntary association of students prior to the commencement of school as in the instant case.

narrowly construed. The inescapable conclusion to be drawn from the decision below is that the Court of Appeals has carved out a religion-rooted exclusion from normal constitutional protections, thus effectively sanctioning governmental discrimination among speakers based upon their messages. Such an exclusion permits restrictions upon the time, place, and manner of exercise of First Amendment rights to be content-oriented, in contravention of this Court's teaching. See *Police Dept. of the City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972).

In addition, for the school authorities to impose such burdens on voluntary student speech and association based on religious content and purpose raises again the free exercise affronts previously discussed. See Tribe, *American Constitutional Law*, 1979 Supplement at pp. 78-79.

Granting certiorari in this case would thus present this Court an opportunity to clarify whether voluntary religious speech and association on public school property, when directed to a voluntary audience outside of school hours, is equally entitled to the same constitutional cognizance and judicial protection as given to student political speech and association.[8]

---

[8] The issues of the legitimate parameters surrounding prayer in public schools continue to be a focus of national attention. The Ninety-sixth Congress saw the introduction of no less than eight pieces of legislation dealing in some manner of the subject (See HR-466, HR-1173, HR-1082, HJR-70, HJR-115, HJR-131, HJR-156, and S-438). Clarification by this Court of the rights of students to engage in voluntary religious activity prior or subsequent to the school day would have the further beneficial effect of eliminating the fractious potential arising from the present uncertain status of such voluntary student activity.

## SUMMARY OF ARGUMENT

The distinction employed by the Court of Appeals below in disposing of the petitioners' freedom of speech and association claims only buttresses the cogency of their free exercise claims. The same considerations which lead this Court to give strict scrutiny to any attempt in the public schools to coerce belief or mandate religious expression similarly impel strict scrutiny of discriminatory burdens officially imposed upon those who would voluntarily associate to express such belief.

The public schools cannot foster democratic values of tolerance in an increasingly pluralistic society by simultaneously pursuing policies of systematic intolerance of voluntary religious expression. Principles of wholesome neutrality toward religion will not permit the religious gerrymandering of which petitioner students are the victims.

## CONCLUSION

Amici curiae respectfully urge that a writ of certiorari be issued in this case and that the judgment of the Court of Appeals be reversed.

THEODORE H. AMSHOFF, JR.
AMSHOFF & AMSHOFF
3260 First National Tower
Louisville, Kentucky 40202
(502) 582-2419
*Attorney for Amici Curiae*
*Leadership Foundation and Kentucky*
*Heritage Foundation*

## CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY )
) SS
JEFFERSON COUNTY )

On this 19th day of March 1981, before me, a Notary Public for the State of Kentucky and Jefferson County, the undersigned Theodore H. Amshoff, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, copies of the Brief of the Leadership Foundation and the Kentucky Heritage Foundation as Amicus Curiae in support of the Granting of Certiorari to the following attorneys:

ROBERT A. DESTRO
GENERAL COUNSEL
CATHOLIC LEAGUE for RELIGIOUS
and CIVIL RIGHTS
1100 West Wells Street
Milwaukee, Wisconsin 53233

EDWART McGLYNN GAFFNEY, JR.
KENNETH F. RIDDLE
CENTER for CONSTITUTIONAL LAW
Notre Dame Law School
Notre Dame, Indiana 46556

THOMAS STEPHEN NEUBERGER
SHELDON N. SANDLER
BADER, DORSEY & KRESHTOOL
1102 West Street
P. O. B ox 2202
Wilmington, Delaware 19899

C. THEODORE CARLSON
TABNER, CARLSON, DAFFNER & FARRELL
90 State Street
Albany, N.Y. 12207

THEODORE H. AMSHOFF, JR.

SWORN TO AND SUBSCRIBED before me
the day and year aforesaid.

*Notary Public*